

CM 334178 1942 SABOTEURS CASE XI OF XVIII TRANSCRIPT

XI

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STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS
Before the
MILITARY COMMISSION TO TRY PERSONS CHARGED WITH
OFFENSES AGAINST THE LAW OF WAR AND THE
ARTICLES OF WAR.

Washington, D. C.

Monday, July 20, 1942.

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VOL XI

C O N T E N T S .

Monday, July 20, 1942.

Name of Witness	Direct	Cross	Redirect	Recross
Spencer J. Drayton		1848		
Earl Hirsch		1850		
Duane L. Traynor		1853 1880	1876	1878 1884
MOTIONS FOR VERDICTS OF NOT GUILTY By Colonel Royall				1887
REPLY TO MOTIONS FOR VERDICTS OF NOT GUILTY By The Judge Advocate General				1900
MOTION OF DASCH FOR VERDICT OF NOT GUILTY By Colonel Ristine				1910
REPLY TO MOTION OF DASCH FOR VERDICT OF NOT GUILTY By The Judge Advocate General				1921

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Wilfong

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Before the
MILITARY COMMISSION TO TRY PERSONS CHARGED WITH
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Washington, D. C.

Monday, July 20, 1942.

The Military Commission appointed by the President by order dated July 2, 1942, met, in room 5235 Department of Justice, at 10 o'clock a. m., to try for offenses against the Law of War and Articles of War, the following persons: Ernest Peter Burger, George John Dasch, Herbert Haupt, Heinrich Harm Heinck, Edward John Kerling, Hermann Neubauer, Richard Quirin and Werner Thiel.

PRESENT: Members of the Military Commission, as follows:

Major General Frank R. McCoy, President,
Major General Walter S. Grant,
Major General Blanton Winship,
Major General Lorenzo D. Casser,
Brigadier General Guy V. Henry,
Brigadier General John T. Lewis,
Brigadier General John T. Kennedy.

As Trial Judge Advocates:

Honorable Francis Biddle, Attorney General of
the United States.
Major General Myron Cramer, The Judge Advocate
General, U. S. Army.

Colonel F. Granville Munson,
Colonel John M. Weir,
Colonel Erwin M. Treusch,
Major William T. Thurman,
Officers of the Judge Advocate General's
Department.

Oscar Cox, Assistant Solicitor General of the
United States.

As Provost Marshal:
Brigadier General Albert L. Cox.

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As Counsel for the Accused except George John Dasch:

Colonel Cassius M. Dowell,
Colonel Kenneth Royall,
Captain William G. Hummell.

As Counsel for the Accused George John Dasch:

Colonel Carl L. Ristine.

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PROCEEDINGS

The President. The Commission will open.

Colonel Munson. If the Commission please, the full personnel of the Commission and all eight defendants and the reporter are present. The personnel of the prosecution staff is present except Mr. Rowe, who is absent on official business. The full personnel of the defense is present except Major Stone, who is absent on official business.

May I make a more or less technical motion on one or two things?

May the record show that the following persons have been sworn, outside the court room, to secrecy, first having been warned of punishment for violation of the oath:

Captain Lyle D. Keith, J. A. G. D., and Colonel John M. Weir, J. A. G. D., Assistant Trial Judge Advocates, on July 16, 1942; Miss Dorothy P. Klein, 1418 Varnum Street, Northwest, Washington, D. C., on July 18, 1942, and Miss Amanda Stilley, 1867 Wyoming Avenue, Northwest, Washington, D. C., on July 20, 1942, the last two persons having been sworn by me.

May the record also show that Major William T. Thurman, J. A. G. D., has been recognized as an Assistant Trial Judge Advocate since the beginning of the trial.

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The President. Very well.

Colonel Munson. May we invite attention to the fact, for the purposes of the record, that there is no exhibit for Prosecution's P-199, that number not having been used.

Colonel Royall. May it please the Commission, in an effort to expedite, so far as possible, putting on such evidence as the defendants may have to offer, we would like to have Captain Wade Bruton admitted to the court room for the purpose of assisting us. He has previously been sworn to secrecy and has been assisting us outside, and there has been no necessity, up to this time, to bring him in. We think it would expedite matters now to do so.

The President. All right. It is so ordered.

Colonel Munson. Do you desire the oath readministered in the presence of the Commission, in view of the fact that he will be in the court room?

The President. I think if you give the proper reminder it will cover the case.

(Colonel Martin F. DuFrenne and Corporal Claude Black entered the court room.)

Colonel Munson (addressing Colonel DuFrenne). I am directed by the Commission to inform you that every person who is in the court room must take an oath of secrecy, and that violation of that oath may result in proceedings in contempt or other proceedings of a criminal nature against anyone violating it. In taking the oath you understand that to be the fact?

Colonel DuFrenne. Yes, sir.

Colonel Munson. Do you solemnly swear that you will not

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divulge the proceedings taken at this trial to anyone outside of this court room until released from your obligation by proper authority or required so to do by such proper authority?

Colonel DuFrenne. I do.

Colonel Munson. (Addressing Corporal Black) You have heard the explanation that I made to the Colonel?

Corporal Black. Yes, sir.

Colonel Munson. That violation of this oath may result in proceedings in contempt or other criminal proceedings? You understand that statement?

Corporal Black. Yes, sir.

Colonel Munson. Hold up your right hand. Do you solemnly swear that you will not divulge the proceedings taken at this trial to anyone outside of this court room until released from your obligation by proper authority or required so to do by such proper authority?

Corporal Black. I do.

Colonel Munson. Will you state for the record your full names, please?

Colonel DuFrenne. My name is Colonel Martin F. DuFrenne.

Corporal Black. My name is Claude Black.

Colonel Royall. May it please the Commission, it now appears from information we obtained from the Attorney General that no other confessions or declarations by any of the defendants are at this time to be offered by the prosecution. Therefore, if it meets with the approval of the Commission, we would like very much to present our argument in favor of restricting each confession or admission of a defendant to that defendant and excluding it as to the other defendants.

Is it in order for us to proceed with the argument at

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this time?

The President. If there is no objection.

The Attorney General. No objection.

The President. Do I understand that you have in any way notified us that the prosecution rests?

The Attorney General. The prosecution will rest presently. I think there are a few witnesses who, after his argument, Colonel Royall may wish to recall for further cross-examination. Otherwise we have rested, so far as our own evidence goes.

The President. Proceed, Colonel Royall.

Colonel Royall. May it please this Commission, the question which we wish to present to the Commission has, I think, been somewhat narrowed by statements made in the record by the Attorney General; and if I am not correct about this I of course want him to correct me. In the course of the last argument that we had on this question my recollection is that the Attorney General said that he was not contending that these confessions were relevant or admissible as against other defendants except in connection with the conspiracy charge.

Am I right about that?

The Attorney General. I do not remember the statement. But go ahead.

Colonel Royall. The reason I was making that inquiry is that it might materially affect the length of my argument and the territory to be covered, because if it were merely as to the question of confessions, the question would be a rather narrow one. But in the absence of some specific agree-

6w ment to that effect from the Attorney General I will address myself to the materiality and competency and relevancy as to all of the counts.

The President. Possibly, since there is a difference in remembrance the counsel and the Attorney General can, off the record, discuss that point, since it may make quite a difference in the dispatch of business. I remember, myself, that the Attorney General made some comment on that point. I do not remember it exactly as being the way it has been stated by counsel.

Colonel Royall. I am not certain that that is correct, myself, sir, and that is the reason I said I was a little doubtful about it. In such a voluminous record it is rather unwise to be dogmatic about one's recollection. I do remember some statement of a similar import.

The Attorney General. I remember we discussed beforehand whether the confessions were admissible, confining it largely to the question of conspiracy.

The President. I think probably I can bring back to your remembrance what I think Colonel Royall has in mind. It was when you came up together here, after I had made my ruling for the Commission on the point of the continuing objections on which we had suspended ruling. We made a ruling and then we suspended it again on the statement of Colonel Royall. Just what you stated at that time I am not sure. Possibly we might refer to the record, although I am not sure it was even on the record.

Colonel Royall. I think it was, sir.

The President. My remembrance, Mr. Attorney General, is

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that when we made our ruling you made some such statement as that if we did suspend ruling, on the request of both of you you might possibly reach some agreement.

The Attorney General. I remember, now, what you have in mind. I do not think this is the same matter. I think I said that after all the confessions were in I might be able to withdraw my presenting one confession against all of them, and you might therefore rule later. I do not think that is what Colonel Royall has in mind.

Colonel Royall. No.

The President. That is what I had in mind in this discussion.

Colonel Royall. In any event, I do not think that the Attorney General, if he made the statement as I recall it, would be bound by it at this time.

The President. Then I think we will have Colonel Royall proceed with his remarks.

Colonel Royall. Here is what he said, sir, if I may put this in the record. Not that it is binding, if the Attorney General takes a different position now. I think he has a perfect right to do so.

Referring to page 749:

"It seems to me that with respect to the other offenses the confession of one man is not evidence against another, the theory of a conspiracy being that in a joint effort the act of each man affects the others, although I think, very clearly and very frankly, the confession of one man with respect to a crime other than the conspiracy would not be admissible against another defendant as matter of substantive defense. With respect

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to conspiracy I think the picture is different. I think I have already argued on that."

That is as I recalled it.

The Attorney General. I think that is correct substantive law. At that time I think we were discussing the proper rule of common law evidence. I do not think that that would necessarily apply to a commission which is permitted to take any evidence which a reasonable man would accept. I think I was discussing the rule in law courts, and I think it is pretty clear, and I will stand by what I said, entirely, on the record.

Colonel Royall. Now, may it please the Commission, regardless of whether or not there is any agreement about that --and there seems to be none--it seems to me that the law is so exceedingly clear and well established as to the competency as to other offenses that it needs very little argument to show that such confessions are not under any circumstances admissible as to any charge except the last charge made against these defendants.

A confession or a declaration made by one person relating to another person is nothing but hearsay, and I do not suppose it is necessary to argue at any length the reasons against convicting people upon hearsay. If that were to be done you could convict somebody on common gossip, and there would not be any very logical way to draw a distinction. When one man gets on the stand and says what a second man says about a third man, if you admit it you are basing your consideration of the evidence upon what the second man said. In the first place, you are taking evidence that is not subject to

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cross-examination, not subject to any ordinary means of impeachment. You are merely taking the bald statement of a second person as far as the first one recollects it, and giving all the flexibility that you can give or want to give to the rules of evidence, to say that a man can be tried for a serious offense upon what one man recollects that another man said is so far from accepted practice, not only in the courts but in the realm of common sense, that it does not seem to me that there ought to be any argument in favor of it.

I am certain that each member of this Commission and of the prosecution's staff, as well as the defense staff, is not prone in private life to convict another man mentally of an offense upon hearsay evidence. Some people listen to gossip and believe it to be true, but most people who intelligently analyze a thing do not reach unfavorable conclusions upon hearsay outside of the court room. All the more should that rule apply in the court room and in a case where there is a serious charge against these parties.

The reason that under certain circumstances confessions are admissible against conspirators or alleged conspirators does not apply to the case of other offenses.

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The only reason why the law under any circumstances admits hearsay as to one alleged conspirator against another is that the theory of conspiracy is that they were acting in that conspiracy together and that, therefore, one of them was the agent of the others; he was speaking for the others in that conspiracy. That is the only reason why the law makes the exception to the hearsay rule in the case of conspiracy.

Of course, that reason does not apply in any degree to other offenses, and I know of no decisions--and I am confident I am not exaggerating when I say that the prosecution cannot cite any decisions--which would tend to show that that exception to the hearsay rule goes further than the charge of conspiracy itself. When the Attorney General frankly made that statement in the record which I read to you, of course he had in mind the unanimity of opinion that the evidence is not competent on other offenses. There would have been no other reason to have made the statement.

At one time he suggested that it might be a part of the res gestae. I do not know whether or not that will be seriously urged. In the first place, it could not be res gestae under any decisions that we know about unless it were a statement made in connection with some act which at that time was being done. Res gestae means a contemporaneous statement made while some crime or alleged crime is being committed, and is so much a part of the crime itself that the court says it is really a verbal act in the crime and, therefore, does not apply to statements not made while the offense is in progress of being committed at the very time of the statements and, therefore, does not apply to any statements a man makes

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while he is in custody.

Not only is that true, but even where *res gestae* is admitted, the Court-Martial Manual says it is not admitted for the purpose of proving the truth of the remark. Therefore, it would not be admissible as against the other defendants in any event. That reference in the Court-Martial Manual is on page 118.

So it seems to us exceedingly clear that as to other offenses than that of conspiracy, these confessions should be rejected so far as the other defendants are concerned; that is, those who did not make the statement or give the confession. As to that, we respectfully ask that the Commission rule in accordance with what we have contended and with what the Attorney General has admitted to be the general rule of law.

That brings us, then, to the question whether these confessions are admissible on the fourth charge, which is the charge of conspiracy. As I stated a few minutes ago, the reason why confessions are ever admitted against other conspirators is on the theory that one was acting for the other. The law has prescribed two tests and two rules for determining whether they are admissible. We have discussed that before. The Commission had those tests in mind--at least, one of them--when it deferred its ruling for a while and permitted us to leave the matter open for further argument.

The first one is that there must be evidence of a conspiracy even if you disregard the confession--that is, evidence outside the confession. The second one is that the confession must have been made in furtherance of the conspiracy.

As to the first test, we cannot argue to the court that there is not evidence outside the confessions that there was

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a conspiracy. I would not think of making such an argument. There is evidence. Without arguing against my own case, it is perfectly apparent that where each defendant has himself stated that there was a conspiracy in effect--two of them saying that they did not join in it with any intent, but stating the facts of the school, the submarine, and everything else--we cannot argue that there is not evidence outside the confessions. We cannot argue it, also, because of the physical evidence that has been produced. There is evidence outside the confessions that there was a conspiracy.

But the second test has not been met. It has not been shown that these confessions were made in furtherance of the conspiracy. That is a prerequisite before the law makes an exception to the hearsay rule, the ordinary rule against hearsay, and admits confessions. The Court-Martial Manual, that I have read to you before, says that the statements must be made in furtherance of the common design, and the only other one is when it is made in an effort to illegally escape from custody by breaking jail, or something like that. That is on page 117 of the Court-Martial Manual.

It seems to us to be axiomatic that when a man is taken into custody, no statement he makes can be in furtherance of the conspiracy. His part and participation in the conspiracy has stopped, unless he is conspiring with the officers of the law. Nothing he says can possibly be in furtherance of the conspiracy. What he tells the officer of the law cannot help the conspiracy. It cannot lend directly or indirectly to its accomplishment. It cannot further the ends of the conspiracy, and it cannot be said that the statement is made on behalf of

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the others.

There is no logical way to say so, and the Court-Martial Manual, in dealing with that very situation--that is, where there is not any statement in furtherance of the conspiracy--says:

"The fact that a confession or admission of one conspirator is inadmissible against the others does not prevent the use of such confession or admission against the one who made it, but any such confession or admission cannot be considered as evidence against the others."

That is found on page 117 of the Court-Martial Manual.

I am going to read to you in a moment some law from the Federal Courts on the very question that we are discussing, as to the exact situation we have here, a statement or confession made by a defendant after he was apprehended, because that has arisen time and time and time again, and, as far as we know, it has never been held admissible. But we have some specific cases saying that it is not, and we shall read those to you.

But let us look for just a moment at the practical side of this matter as applied to this case. Not only are we dealing here with confessions in which one defendant says what another one thought, but all through these confessions, interwound and interwoven, so that they cannot be extricated, are statements of one defendant as to what another defendant thought, which he could not possibly know; statements of one defendant as to what an F. B. I. agent told him about another defendant--double hearsay; and in two or more instances what a defendant said that an F. B. I. agent said that somebody else said about the other

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defendants. There you have triple hearsay.

As I say, there is so much double hearsay in here, so much evidence that would be incompetent if a defendant himself were on the stand. Take the statement, for instance, of the defendant Dasch. Contained in there are hundreds of statements which Dasch could not be asked about if he were on the witness stand. He could not testify about them because he would be telling what other people said and what other people thought. Yet the effect of admitting these confessions is to put in evidence without the benefit of any cross-examination evidence that one of these defendants could not himself have given if he had been put on the witness stand and sworn. So what we in effect are doing if we admit these confessions is saying that a man cannot be sworn and testify to a fact, but he can be unsworn and somebody else can recollect what he said, and it is admissible. That is exactly what we have here in this case.

The argument was made, as I recall it, the other day that even after the arrest of some of these defendants, the rest of the conspiracy was continuing and that, therefore, this evidence was admissible. We said at that time, and say again, that it is immaterial whether the rest of the conspiracy is continuing. The test is whether it was continuing as to the man who was under arrest. Of course, it was not continuing when he was arrested. That case was presented in a recent Federal Court decision, U. S. v. Lonardo, 67 Fed. 2d 883:

"The statements of Hatlen and Gates were admitted against him over his objection; the prosecution's theory being that the concerted purpose of the confederates had not yet been completely fulfilled, and that the

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declarations of one were admissible against the rest until it was. We need not pause to consider whether in fact the common purpose had ended, because it would make no difference if it had not. Declarations of a confederate made after his arrest will not, except in most unusual cases, be in furtherance of the common plan; we need refer only to our discussion of the point in Van Riper v. U. S., 13 F. (2nd) 961, 967."

Dealing with exactly the same situation, in Gambino v. United States, 108 Fed. (2nd) 140, the Court said:

" * * * if the agency is terminated or the conspiracy is over, there is no longer any authority in the agent to act on behalf of his principal or of the accomplice to act on behalf of his co-conspirators. This is part of the substantive law of agency and of conspiracy, rather than of the law of evidence. The error in treating such assertions as part of the res gestae"

has been discussed.

"It, therefore, follows that assertions made by an accomplice after the termination of the conspiracy come within the prohibition of the hearsay rule and are inadmissible."

That was dealing with a case where two of the defendants were at large, presumably two or more of them were engaged in a conspiracy, and one of them was apprehended and made statements to the officers.

There is another case, the case of Minner v. United States, 57 Fed. 2nd 506, in which the Court said:

"The acts and declarations of a conspirator to

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be admissible against his co-conspirators must occur during the existence of the conspiracy and must be in furtherance of its objects."

I cited before the case of Logan v. United States, in the Supreme Court of the United States, 144 U. S. 263, to the same effect. That case has been cited time and time again.

In the case of Dowdy v. U. S., 46 Fed. 2nd 417, the Court said:

"It is well settled that before such a statement or declaration is admissible, it must not only be made during the continuance of the conspiracy, but it must be made in furtherance of it. These statements were nothing more than a confession by Martin, implicating Funk, and all authorities held that they are inadmissible except as against the party making them."

That was where one of the conspirators had been arrested.

I could cite numerous other decisions if it were necessary to do so, and I will do so if the Commission requests. But that is the essence of the argument.

In recapitulation, briefly, the evidence is clearly incompetent on any charge except the fourth; and it is also incompetent on the fourth charge, first, because it was not made in furtherance of the conspiracy and is, therefore, inadmissible under all the authorities that I have been able to find, and I do not think there are any to the contrary; second, that these confessions contain in them double and triple hearsay which would not be competent even if the declarant who made the confession were on the stand himself.

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Now, this is a matter that is of very serious import, of course, to these defendants. The prosecution has shown the facts relating to what was done with a great deal of particularity, but when you come to weighing the guilt of these men by what a second person said about them, and their mental processes, or what a second person said to a third person, or what a fourth person said, then you are not doing much more, on that feature of the case, than trying them on common gossip.

It is not our view that the ruling on this will dispose of this case one way or the other; but, in the interest of these defendants, and in an effort to see that this case, involving the question of their guilt or the degree of their guilt or the specific offenses they may be guilty of, should be tried upon evidence--and only upon evidence--that meets with the rule of established law and the rule of reason, we feel that the Commission should exclude these confessions on all of the counts as against the defendants other than those who made the specific confessions.

Colonel Ristine. If the Commission please: I think there are possibly just two matters that I wish to call to the attention of the Commission. The Commission will recall that, I think in two instances, the defendants had made statements, and after those statements had been written up and presented to them for signature, they stated that they did not desire to sign such statements because they were not correct; that they were misstatements rather than truthful statements; and that they wanted to make other statements which they said would correctly portray the facts.

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Now, if an accused confessedly makes a statement after he is apprehended and then says it is not a true statement, but then says he desires to make a true statement, I say, Would it be safe for us to accept either statement under those circumstances and use it for the purpose of depriving a person of his liberty or his life?

That is the reason for the rule against statements made by defendants after they are apprehended insofar as they may affect other persons. Of course, the law presumes that if a man says something against his own interest, that is probably true, because the natural thing for him to do would be, if he says anything at all, to say something in his favor, rather than something that is against his interest. However, that is not true with respect to anything he says about third parties.

I think the Manual summarizes this situation very briefly, and I would just like to read two paragraphs from page 117 of the Manual for Courts-Martial. The heading is: "Acts and statements of conspirators and accomplices":

"In cases where several persons join with a common design in committing an offense, all acts and statements of each made in furtherance of the common design are admissible against all of them. It is immaterial whether such acts or statements were done or made in the presence of hearing of the other parties."

Now, that refers to the acts and statements that are made in furtherance of the thing they conspired to do and are then engaged in doing. Now we come to the exception:

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"The acts and statements of a conspirator, however, done or made after the common design is accomplished or abandoned, are not admissible against the others, except acts and statements in furtherance of an escape. Of course, this rule is not to be construed as affecting the competency of one accomplice to testify against the others."

In other words, any one of these defendants, if he had so desired and had so requested, could have taken the stand, as a part of the prosecution, and given evidence against all of the others with respect to any matter about which he had knowledge.

Now, the last paragraph on that page:

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"The fact that a confession or admission of one conspirator is inadmissible against the others does not prevent the use of such confession or admission against the one who made it, but any such confession or admission cannot be considered as evidence against the others."

Now, I think that very concisely states the rule that should be applied in this case. In other words, every confession made by every one of these defendants after he was apprehended is not competent evidence against any of the others, but it is competent evidence against the one who made the confession.

The Attorney General. May it please the Commission.

The President. Mr. Attorney General.

The Attorney General. With due deference to my learned

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opponents in the common law, I think their argument has tended to complicate the issue before the Commission rather than simplify it.

In simplifying an issue it is often well to move from a contested point of law to the facts and see what the facts are. So let us start by looking at the facts, because, after all, what is before you is whether you believe certain facts on a certain basis, that is all. It is a very simple issue.

What are the facts? Four men landed on Long Island. Two of them went to New York. One went down to Washington and gave certain statements to the F.B.I. Presumably as a result of those statements, and certainly subsequent to those statements, other men were arrested. Each one of them was arrested alone. Neither of them had any opportunity to confer with any of the other conspirators. Each one of them, after careful examination, without any compulsion of any kind, separately made a statement, read it over, corrected it in ink, signed it, and signed each page.

Now, the interesting thing--and this is the essence, I think, of the whole thing--is that those men, not having an opportunity to confer or talk it over, on the whole made confessions entirely bearing out what each other one said. Dasch supports Burger, Burger supports Kerling, and so on, right down the line. Right down the line they are alike. You have got each one of them. You have got all eight.

The extraordinary thing--and I think if you will simplify it to this essence you will see how extraordinary it is--is that the defendants say that in spite of that close interlocking of all those statements, all alike, all bearing the

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obvious marks of truthfulness, all comparable to each other, all showing this essential common intent, although your Commission says you can listen to any evidence that would convince a reasonable man, you must in some curious way take out of your minds with respect to some defendants the confessions of the others. The whole thing is completely interlocked, each one being tied in with the confession of the other.

In other words, the point of the argument is entirely aside from the essence of the problem. The point is, really, what weight you should give to them. Counsel says you must not even look at them. You must not keep your eyes or ears open to them. Because of some technical rule of the common law you are not allowed to.

The question is a matter of weight, and as to any part of any confession if there seems to be evidence which does not bear much weight, that is for you to discard as you sum up and think about all the evidence together. But to say, after the outline which I have sketched, that no reasonable man would think that what Dasch said to the F.B.I. in Washington had anything to do with Burger seems to me to be simply preposterous, if you judge it under the power that is given you under this Commission.

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Now, that power is not unusual. This Commission is not set up with extraordinary power. Every arbitration board--I won't say every, but most arbitration boards--dealing from a business point of view and not bound by the technical rules of evidence discards the hearsay rule. The various administrative tribunals set up under statute--the National Labor

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Relations Board, the Securities and Exchange Commission, and most of the administrative tribunals--are not bound by the hearsay rule.

The rules under which this Commission is acting are rules which have been applied largely to the expression of administrative law, the practical way of arriving at the truth, and the question really is as to what weight to give to these confessions.

You can test it by this: "Do I think that Kerling's confession is backed by one of the others? It is inescapable to believe that it is." For instance, do you not think that now that eight confessions are in the case has been proved rather more than when only one was in? The thing ties so tightly together that I cannot conceive that you, as a body of reasonable men, would exclude this evidence on the ground that it does not carry weight, and that is really what is amounts to.

Colonel Royall. May it please the Commission: It seems to me that the Attorney General has illustrated very concretely the reason why these confessions should not be admitted.

To the extent that they are alike--and that is his argument for saying they are admissible--there is no necessity for having them before the Commission. It is only to the extent that they differ that it is material to the defendants to exclude them. It is only where one defendant says something about the other's mental processes or acts that the other one did not say that it is essential to exclude them. As to the other features of the confessions, the argument advanced by the Attorney General does not apply.

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Now, I want to comment on two other things, briefly. He cites the arbitration boards. Am I to understand that the prosecution in this case says that a man's liberty is to be determined upon the same basis that businessmen would arbitrate a dollar-and-cents controversy? If that is the law, we are losing mighty near all of our vaunted system of criminal justice.

I say further only that the Attorney General has cited no authority of any court anywhere to sustain the position taken.

The Attorney General. May I remind the Commission that you were kind enough to say that you might adjourn just before

11? That is just a reminder.

The President. The Commission will recess for fifteen minutes.

(There was a short recess taken, at the conclusion of which the following occurred:)

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Wilfong
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The President. The Commission is open.

Colonel Munson. The full personnel of the Commission is present; the eight accused are present; the full personnel of the prosecution is present except Mr. Cox and Mr. Rowe. The full personnel of the defense is present, and the reporter is present.

Do you have a witness whom you desire sworn?

Rives.
Major ~~James~~ Yes, sir. Miss Hall, the matron of the jail, is to be sworn as to secrecy, so that she may be in the court room at the time female witnesses may be on the stand.

Colonel Munson. The Commission instructs me, before administering the oath of secrecy, to inform you that violation of that oath may result in contempt proceedings or proceedings of a criminal nature. Each witness taking that oath, therefore, has to understand that. I presume you do understand the consequences of a violation of that oath?

Miss Hall. Yes, sir.

Colonel Munson. Hold up your right hand, please. Do you solemnly swear that you will not divulge the proceedings taken at this trial to anyone outside of this court room until released from your obligation by proper authority or required so to do by such proper authority?

Miss Hall. I do.

Colonel Munson. Will you give your full name to the reporter, for the record, please?

Miss Hall. My name is Lucile C. Hall.

Colonel Royall. May it please the Commission, Captain Wade Bruton, to whom I referred previous to the short recess, is in court, and I desire to introduce him as an assistant in the defense counsel and to advise the Commission that I

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understand he has already taken the oath of secrecy. As to whether the Commission desires that a further oath be given him I leave to the Commission.

Colonel Munson. There was some confusion this morning, and when Captain Bruton's name was mentioned Colonel DuFrenne came forward and took the oath. Captain Bruton has been sworn to secrecy outside the court room. I understand that the Commission's instructions are that I shall remind him of that oath, and, Captain Bruton, that any violation of that oath may be punished by contempt proceedings or by proceedings of a criminal nature, which I think you understand and which was explained to you prior to your taking the oath outside the court room, was it not?

Captain Bruton. Yes, sir.

The President. It is so ordered.

Are there any further remarks on the side of the defense or on the side of the prosecution?

The Attorney General. No, sir; nothing on our part.

The President. Mr. Attorney General, the Commission inquires, for further enlightenment, whether the Attorney General contends that the particular confessions of each of the defendants should be admitted as affecting both the charge of conspiracy and the other charges.

The Attorney General. I do so contend, because on the record I stated, and I thought it was for that purpose only, that I did not think that in a court of law the confessions of any defendant should be admitted against another, except on conspiracy charges. I thought that we were discussing ordinary common law procedure. Obviously it does not seem to me that that rule of common law, which I frankly admit

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would be followed in a common law court, should be applicable to this Commission, and therefore it seems to me that the confessions of all are evidence of all of the crimes. I am perfectly clear on that in my own mind, that when I made that statement in the record we were discussing the usual procedure in a court of law, and of course in any criminal procedure in a court of law you could not admit a man's confession except in a conspiracy. That explains the theory.

The President. Have counsel for the defense any further remarks?

Colonel Royall. We have none.

The President. The Commission will close.

The Attorney General. May it please the Commission, may I say one more word?

The President. The Commission is open for that purpose.

The Attorney General. I am sorry. Just to bring that point in a little more sharply, Mr. Cox has just handed me a copy of the transcript, and I find that on page 749 the President asked me this question:

"I would like just to ask at this point, if this were a court where the probative clauses that you quote had not been in question, for example, but the rules of the common law only, what would your feeling be on the statement of the defense counsel?"

So I think it shows that generally at that time we were addressing ourselves to procedure in a court of law; and that was my understanding.

The President. The Commission will close.

(The Commission was then closed. When it reopened the following occurred:)

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The President. The Commission will open.

Colonel Munson. The full personnel present before the recess is again present.

The President. I shall read from the record, page 1695:

"The President. Before we proceed, I have a statement to make regarding the Commission's suspended ruling on the continuing objections of the defense counsel, in which he objects to the admission of statements contained in the confessions and admissions of the various defendants as affecting the other defendants.

"The Commission rules that those statements are admissible as affecting the other defendants. In view of this decision, the counsel for the defense is at liberty to recall for cross-examination any witnesses he may desire."

You may remember that at that time both sides requested that the ruling be further suspended until the case developed further and the defense counsel had an opportunity to argue. We have now done that, and the Commission adheres to its former ruling and will admit the confessions and admissions for all purposes.

Colonel Royall. May it please the Commission: There is one other feature of the case to which I desire to call the attention of the Commission at this time. The Court-Martial Manual provides, on page 62, as follows:

"The failure of an accused to take the stand must not be commented upon; but if he testifies and if he fails in such testimony to deny or explain

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specific facts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may be commented upon."

In other words, I have read the whole sentence, but the point I wish to emphasize is:

"The failure of an accused to take the stand must not be commented upon."

The President. The Commission is familiar with that rule of evidence and safeguard and will take cognizance of it.

Colonel Royall. That is read in connection with an extract from page 125, which reads as follows:

"The accused is at his own request, but not otherwise, a competent witness."

In the early part of this hearing the following proceedings were had, and I read from page 325 of the record. This was by the Attorney General:

"May it please the Commission: The prosecution now intends to call the defendant Burger. I understand, and I have conferred with counsel for the defendants, that counsel have advised him not to take the stand. I should like to call him to the stand and to have the President of the Commission instruct him as to his rights and duties under the circumstances.

"Burger, will you take the stand, please?

"(Ernest Peter Burger stepped forward.)

"Colonel Munson. Do you desire to instruct him, may I ask the Commission, before he is sworn, as to his rights? Should he be sworn first, do you think?

"The President. I think we will not swear him.

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"Colonel Munson. The Commission will inform you of your rights."

There then followed the instructions which the Commission gave Burger as to his rights to go upon the stand.

May it please the Commission: The counsel for the defendants are somewhat concerned about that occurrence, and for this reason. The Manual expressly states that a defendant can go upon the stand only at his own request. The defendant Burger had made no such request. He was called without having made the request. It was necessary for counsel on his behalf and for the defendant Burger himself to make the affirmative statement that he did not desire to go upon the stand at that time.

I am not more confident of anything than the fact that this Commission will seek to and will, so far as human minds can do so, carry out the express provision I read from the Court-Martial Manual. But the defendant Burger having been asked in open court to take the stand and having been put in a position of having to refuse to do so or elect not to do so, it is very difficult to fail to construe some feeling that he might be unwilling to give all the facts. In recognition of that practical situation, first, it is our intention at this time to tender the defendant Burger to the prosecution or to the Commission for such questioning as they desire to propound to him. We think in his interest that that should be done now, before the prosecution's case rests. That is, we think we should tender him now.

There is one second thing I want to say about that. The defendant Burger stated, as I recall his statement here--I think

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I can give the substance of it correctly--that he was acting under the advice of counsel in not taking the stand. That was correct.

I hope I do not transgress any proprieties--if I do, I want the Attorney General or the Commission to stop me--but I desire to tell the Commission, in view of these unusual circumstances, why we so advised the defendant Burger at that time. It will not involve any evidentiary matter that could possibly prejudice the case. Defense counsel were in a rather embarrassing position about the defendant Burger. He wanted to make available to the prosecution or the Commission anything that he knew about this matter. We, however, were representing six other defendants; and not knowing at that time just what evidence would be adduced or offered or admitted as to the other six defendants, we had to make a choice, and we did not want to throw that burden onto anybody except ourselves. In resolving that possible conflict of interests, we thought that the only course we could follow, since six were on one side, so to speak, and one was on the other, in the matter of whether Burger should go on the stand, was to advise Burger not to take the stand.

Those considerations have very largely disappeared. I might say they almost entirely disappeared with the ruling the Commission has just made about the confessions. Therefore, we do not see how tendering the defendant Burger for examination at this time could be adverse to the other defendants, and the doubt that we had, or the possible conflict of interests that we thought existed, has been removed.

Those are the two purposes: first, to remove any

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possibility that anyone should have the impression that the defendant Burger does not want to give every fact that he has; and second, that there is no apparent conflict with the interests of the other defendants at this time.

Before I sit down, I want to say that it is not my intention by anything I have said to imply or to state that the Attorney General has done anything improper in this matter --certainly not with the intention of doing anything improper. I am not very familiar with the Court-Martial procedure. It is possible that the course the Attorney General followed was thoroughly in line with what is done in Courts-Martial; I do not know. I am not making these remarks for the purpose of criticizing anybody, but merely to clarify the situation in order that the Commission may understand why we are at this time tendering the defendant Burger for such examination as the prosecution or the Commission may desire to make.

The Attorney General. On behalf of the prosecution, we do not wish to accept the tender that the prosecution put Burger on the stand at this time. We appreciate the offer, but we do not wish to accept it.

Colonel Royall. May I inquire of the Commission if they desire to examine the defendant Burger at this time with reference to any feature of his statement or any feature of the case? If so, he is available for that purpose.

The President. There seems to be no desire on the part of the Commission at this time.

Colonel Royall. May it appear in the record, then, that we made this tender?

The President. Yes.

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The Attorney General. May it please the Commission: Three witnesses are now being called for purposes of cross-examination. After they have been cross-examined, we shall then close our case formally.

We will call Mr. Drayton.

Colonel Royall. We should like Mr. Donegan to remain outside the room while the first witness is on the stand.

The Attorney General. Mr. Donegan will withdraw while Mr. Drayton is on the stand.

Lieutenant Page. Mr. Spencer J. Drayton. This witness has been sworn to secrecy.

Colonel Munson. Mr. Drayton, you are reminded that you are still under oath.

Mr. Drayton. Yes, sir.

SPENCER J. DRAYTON

was recalled as a witness and, having been previously duly sworn, testified further as follows:

CROSS-EXAMINATION

Questions by Colonel Royall:

Q Mr. Drayton, were you present during a portion of the time when the defendant Kerling was being interrogated by the F. B. I.?

A Yes, sir.

Q Were you present with Agent Donegan during that interrogation?

A I was in there part of the time, sir.

Q During the time you were there, did the agent Donegan strike, push, or otherwise contact forcibly the defendant Kerling?

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A Not while I was present, sir.

Q Did you see Agent Donegan take Kerling by the hair while you were there?

A No, sir.

Q Have you discussed with Agent Donegan since the adjournment Saturday or since the adjournment Friday the fact that you were to be recalled to the stand?

A Yes, sir.

Q Have you discussed with him the episodes that occurred while you and he were together with Kerling?

A No, sir.

Q Did he say anything to you about it?

A Sir?

Q Did Donegan say anything to you about the occurrence with Kerling?

A He called me in New York and told me I was to be recalled.

Q Did he tell you anything about the occurrence with Kerling?

A No, sir.

Colonel Royall. All right, sir; that is all I can ask you.

The Attorney General. That is all.

The President. Are there any questions by the Commission? There seem to be none.

The Attorney General. That is all.

We will call Agent Hirsh.

Lieutenant Page. Mr. Earl Hirsh. This witness has been sworn to secrecy.

Colonel Munson. Mr. Hirsh, you are reminded that you

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are still under oath.

Mr. Hirsh. Yes, sir.

EARL HIRSH

was recalled as a witness and, having been previously duly sworn, testified further as follows:

CROSS-EXAMINATION

Questions by Colonel Royall:

Q Mr. Hirsh, were you present during a part of the time the defendant Herbert Haupt was being questioned?

A Yes, sir, I was.

Q Do you recall what part of the time?

A I would say I was present practically all of the time with the exception of probably just a few moments here and there.

Q Mr. Hirsh, if any questions I ask you require refreshing of your recollection by referring to any written document, you will feel perfectly free to refer to it, will you, sir?

A Yes, sir.

Q Did the defendant Haupt tell you during the course of the conversation that he did not leave his home in Chicago originally with the intention of going to Germany, but left intending to go to Mexico and Nicaragua?

A I believe he did make that statement.

Q Did he tell you that his decision to go to Germany was reached only when he could not arrange to go to Nicaragua and needed financial assistance that was furnished by a German agent or consulate?

A He was not exactly sure on that particular point. He did state that he ran out of funds while in Mexico City

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and that he ran across an individual named Hans ^{SASS}. This individual introduced him to the German Consul in Mexico City.

Q The Consul arranged to send him to Japan; is that right?

A Well, there was some dickering back and forth as to the purpose of the proposed trip; however, Haupt did not tell us the exact purpose of the trip.

Q But he did say that they arranged to transport him to Japan; is that right?

A That is correct, and he stated that he signed a contract to repay the money.

Q Did he tell you that before he left Chicago or when he left Chicago he left a good part of his clothing and a good part of his personal belongings there?

A No, sir, he didn't make that statement in my presence.

Q Did he tell you that when he got to Japan, he found that he had no option but to go on to Germany?

A Well, it wasn't exactly put that way.

Q What did he say about that? Tell exactly what he said.

A At the time the boat arrived in Yokohama, Japan, from Mexico City he did state that he was met by persons from the German and the Japanese consulate offices, or the Gestapo, as he put it, and at that time he was practically taken into custody. However, he was away from them a good part of the time; he had freedom of motion.

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Q But he did say that thereafter they recalled him to Tokyo, did he?

A He stated that he received a telegram requesting that he return, and that he did return.

Q Now, did he tell you that when he got to Germany he wanted to return to his parents in the United States?

A Well, it wasn't exactly put that way.

Q He said he wanted to get back to the United States?

A He thought that possibly that was the only means that he would be able to get back.

Q In other words, he thought that the only way he could get back to his parents in the United States was to get into this plan; isn't that correct?

A No, sir. He said that he accepted the proposition first before he stated that that was the only means of returning to the United States. In other words, he knew that he was to be a sabotage agent prior to the time that he was to return.

Q Yes, I understand that; but in connection with his agreement to this school, he did tell you that he thought that was the only means he had of getting to the United States?

A Yes, that is right.

Q Now, did he tell you that while he was in Germany he was unable to obtain work before he went to this school?

A Yes, he did make that statement.

Q Did he tell you that during that period he was constantly watched and annoyed, or at least occasionally watched and annoyed, by the Gestapo and police?

A He stated that he was occasionally annoyed, that is

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true.

Colonel Royall. That is all. No further questions.

The President. The witness will be excused.

The Attorney General. Mr. Traynor.

Lieutenant Page. Duane Traynor. This witness has been sworn.

Colonel Munson. Mr. Traynor, you are reminded you are still under oath.

DUANE L. TRAYNOR

was recalled as a witness and, having been previously duly sworn, testified further as follows:

CROSS-EXAMINATION

Questions by Colonel Ristine:

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Q Mr. Traynor, I believe you were on the stand before?

A I was.

Q I believe you were the one at F.B.I. Headquarters with whom Mr. Dasch first communicated here in Washington, D. C.?

A I was.

Q That communication was by a telephone call from Mr. Dasch?

A It was.

Q Now, did Mr. Dasch tell you, when talking to you over the phone from the Mayflower Hotel, that he would like to, if possible, come over at an earlier hour than the hour you had suggested?

A I suggested 11 o'clock to him, and he wanted to know if I could make it earlier. I informed him that I could make it at 10:30, if it was satisfactory to him, and he agreed

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to that time.

Q And did he request you to send some agent from the F. B. I. office to accompany him over to the office?

A He indicated to me that he would have a hard time finding my office, and I told him that an agent would come and pick him up and bring him over here.

Q Now, that was the first information, so far as you know, that the F. B. I. had as to the location of any of the group that are now being tried?

A That was the first indication that I had.

Q Had you previously received word from the New York office to the effect that Mr. Dasch, or a person by some other name, would come to Washington and contact the F. B. I. office?

A I had received no such notification.

Q Now, when Mr. Dasch appeared at your office did he request permission to see and talk with Mr. Hoover?

A I can't recall at this time that he in so many words said that, although during the time I was talking to him he did express a desire to see Mr. Hoover, if possible.

Q And do you recall what you told him about his being permitted to see Mr. Hoover?

A I told him that Mr. Hoover was not available to see him, that Mr. Hoover might possibly find time to see him while in Washington, but that I could not assure him that he would see him.

Q Now, did Dasch tell you at the outset that in appearing voluntarily to tell his story he did not do so as an informer or a stool pigeon, but because he considered it his duty, not only as a Christian but as an enemy of Hitler, to

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make full disclosure to the F. B. I.?

A No, sir, he did not say that.

Q Well, would you tell the Commission what your recollection of his statement is in that regard?

A He told me that he had a mission in coming over here; that that mission was to fight Hitler and his Nazi crew; that he could not fight it in Germany and therefore he had to find a way by which he could get out of Germany and therefore fight them from the outside. He stated that he was coming and furnishing this information as a means towards gaining that end.

Q Now, did Dasch also tell you that it was his sincere conviction that in coming to the United States for that purpose he was an ally of the forces that were fighting Hitler?

A I don't recall him using that phraseology.

Q Well, would you tell us as best you can recall what phraseology he used?

A He expressed a desire to fight Hitler and to fight Hitler in his own way--not with guns but by propaganda.

Q Now, I believe he did ask you for permission to make his statement to you in his own way, rather than by starting out on a question and answer basis, did he not?

A He did not ask permission. He stated that he wanted to give it in his own way, and that was the only way he wanted to tell it. He wanted to tell it from the very beginning--take as much time as he thought he needed.

Q And I believe that you accorded to him that privilege?

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A I did.

Q He was, I believe, just a little bit slow in getting down to some of the concrete facts that your Department was interested in, was he not?

A He refused to give that kind of information at all at first except in the way he wanted to tell the story.

Q And I do not believe he gave you the name or address of any of the others in the group until in the statement of the first day; isn't that correct?

A He mentioned the names during the statement of the first day, but he gave us no indication of where they might be located or where they could be found until about 11:30 the first day--11:30 at night.

Q And then, I believe, he gave you the name of Burger and where Burger could be found?

A That is correct.

Q And that information, I take it, was forwarded to New York and Burger was taken into custody the next day, was he not?

A I know from wires we have received from New York that I have seen that Burger was taken into custody the next day. It undoubtedly was furnished the New York office, although I did not furnish it.

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Q Dasch did tell you at the very outset that he was going to tell the whole story connected with the mission of the group that he came with and any other matters that might be of interest to the Department, did he not?

A No, he did not say that at the very outset. He eventually told us everything we asked him, but he did not

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say that he would tell us the whole story--in fact, he indicated that he might hold back something until he got in touch with other persons.

Q How did he so indicate that?

A An example of that would be in the first hour in which he was in my office. He had indicated that he came to this country from Germany, and I asked him, "Did you come by submarine?" and he immediately shied away from that and said, "I won't answer that kind of a question." That is an example of how--

Q Well, he told you at the outset that he wanted to tell the story in his own way, did he not?

A He did.

Q And your interjecting interrogations while he was telling the story would not be a compliance with that request, would it?

A May I hear that question again, please, sir?

Colonel Ristine. Will you read the question?

(The last question was read by the reporter.)

A I figured I had the right to put out questions to him when he was telling the story.

Questions by Colonel Ristine:

Q Well, it would not be a compliance with his request that he be permitted to tell the story in his own way, would it?

A I think it would be, yes.

Q Of course, if Dasch, appearing for the purpose of aiding this Government, in telling this story at the very outset divulged the names of the other parties and their location, so that you could immediately apprehend them, it might be

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difficult thereafter for him to make his position clear in the matter; isn't that correct?

A I do not believe that is correct, either, sir.

Q Well, Mr. Dasch certainly wanted to convince the F.B.I. of the voluntariness of his coming before the F.B.I. and be sure that they understood the intentions he had in coming over with this group? That is correct, isn't it?

A I don't know what Mr. Dasch's intentions were except what he told me.

Q Well, wasn't it evident from what he told you and the manner in which he told you that they were his intentions?

A I am sorry, but I do not quite follow what you want by that question.

Q Well, he is now confronted with being tried with the other seven men. That is a fact, isn't it?

A Yes, sir.

Q And apparently he did not convince somebody somewhere of the intention that he had before he left Germany to come over here with this group for the purpose of getting to a place where he could fight Hitler and the Hitler regime. Isn't that self-evident?

Colonel Royall. The other defendants object to that examination. It is calling for a conclusion of the witness. I do not know whether it can reflect on any of the other defendants, but if pursued it might well reflect on all eight of them.

Colonel Ristine. I cannot see where.

Colonel Royall. That calls for a conclusion, may it please the Commission. If there is any question about that

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fact, I think the answer could be read to the Commission. It calls for the opinion of this witness on something that might be prejudicial.

Questions by Colonel Ristine:

Q Mr. Traynor, I believe you spent the night of June 19th to the 20th in room 351 of Mr. Dasch's at the Mayflower Hotel, did you not?

A I do not recall the room number at the present time, but I spent that night with Mr. Dasch in his hotel room.

Q And on that occasion did not Mr. Dasch show to you the briefcase and the money which he had there in the hotel room?

A He did.

Q And did you see the notations that were made on the envelopes setting forth the amounts of money, as well as that other notation that was on one of the envelopes?

A I saw the notations he made on the envelopes. I do not know as I know what counsel is talking about when he says the other notations on the envelopes.

Q Prosecution's Exhibit 172, Mr. Traynor, I believe was in the briefcase at the time you looked at the money and the contents (handing a document to the witness)?

A I saw a letter similar to this one.

Q And would you read the contents of that so as to refresh the Commission's mind about the matter?

A "June 18, '42." I believe the next word is "Content, \$82,350 money from German Gov. for"--

Q Is that word "their"?

A The word may be "their." "proper"--

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Q "Purpose"?

A "Purpose," I believe the word is. "but to be used to fight them Nazis. George J. Dasch, alias George J. Davis, alias Franz Pastorius."

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Q You say that that was in the brief case which he showed you, along with the money?

A I do not know whether that particular letter was in the brief case or not. I know he showed me a communication similar to that.

Q And it was written on the stationery of the Hotel Governor Clinton, the same as this?

A It was.

Q This document, by the way, was offered by the prosecution as part of its evidence, as Prosecution Exhibit No. 172.

Now, I believe that Mr. Dasch showed you the other things in the room. You saw the other suitcases and clothing in the room at the same time that you saw the money; did you not?

A He showed me his two suitcases, and I noticed clothing hanging in the closet. I did not examine it.

Q I believe that Mr. Dasch told you in connection with showing you the money that he had brought the money with him from New York to Washington?

A He did.

Q He was not at all secretive about any of this, was he? He cheerfully and willingly showed you these things, did he not?

A He did.

Q He was in no way awed by the fact that he had carried that suitcase down or that he had that suitcase with that amount of money in it, from his appearance or from his actions, was he?

A I do not believe I am able to state whether he was awed or not. He took it in a manner of carefreeness.

Q And it was part and parcel of his willingness to

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make full disclosure, was it not, the disclosure that he made respecting the money, the amounts, and all?

A I cannot answer that question yes or no. It was part of his telling me his story.

Q Did he express to you pleasure at having obtained that large amount of money which he thought then he would be able to use in his efforts to fight Hitler and the Hitler regime?

A He did.

Q Did he say at that time that he was sorry that he had not been able to obtain a greater sum for the same purpose?

A I do not recall that statement; no, sir.

Q Did he say anything in substance and effect like that?

A I do not recall that he did.

Q Did you tell Mr. Dasch that you had installed agents to guard the room and money, because there was such a large sum of money and because people have even killed others where such large sums were involved?

A I cannot answer that question yes or no, either. I did tell him that we had installed guards up there in order to be certain that the money did not disappear and also for his own protection.

Q What did you say about the fact that people had even been killed where a large sum of money was involved?

A I made no statement such as that.

Q At least, you do not now recall having made such a statement?

The Attorney General. Wait a minute. He said he made

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no such statement; and I do not think it is proper to then say that he did not recall it. He said frankly and definitely that he made no such statement.

Colonel Ristine. I understood he said that, and I still think that my question is proper. I do not think the witness would attempt to say that he could remember everything that occurred on that occasion.

Questions by Colonel Ristine:

Q I believe Mr. Dasch told you that he was willing to further cooperate with the F.B.I. office in regard to any matter that he could be helpful about, respecting defensive measures, did he not?

A He did.

Q I think that during the interrogation you went into a lot of subjects other than the specific instance about which this trial is being held, on the grounds or with the explanation that defensive measures which this Government might desire to take would be helped and furthered by going into those other subjects. Tell the Commission in your own way what was said respecting that matter.

A I discussed with him other subjects and told him that having just come from Germany he would have information which we might consider of value and might be able to use in our war effort, and I therefore questioned him on such things as our propaganda, radio communications, and so forth.

Q He was particularly interested in having an opportunity to talk over the radio to the German people for propaganda purposes, was he not?

A He was.

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Q And it was that desire on his part which he expressed to you that also reflects his statement that he was glad to have that amount of money because he thought then that it would be available for that purpose?

A He thought that this money would be available for that purpose, and he was pleased that he had been able to get out of Germany with that amount which could be turned to that purpose.

Q I believe Mr. Dasch said with respect to his explanations about defensive purposes that he was willing to cooperate with the F.B.I. in any way that he could, and especially in tracking down people who, under the protection of American citizenship, were helping the present German Government in one way or another?

A He did.

Q Did Dasch express to you his extreme desire to be permitted to fight Hitler by way of the radio?

A He did.

Q And did you in that connection, Mr. Fraynor, explain to him that in due time he would be introduced to the right people who could and would discuss the propaganda phase with him?

A I did not tell him that exact wording; no, sir.

Q Tell us in your own way your recollection of it.

A I pointed out to him, in talking with him, that we had two primary tasks. One was defensive, as far as the United States Government was concerned, in locating as quickly and rapidly as possible anyone who was going to blow up and damage any part of our war industry in this country. That

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was the primary objective. After that was accomplished and after we had been able to insure ourselves that this might not happen, then the other objective, which he was more interested in, the offensive objective from the point of propaganda could be considered, and that at that time we would give consideration to his particular problem with regard to propaganda.

Q Did it appear to you in your many discussions with Dasch that he was a sincere and truthful person and that the facts and material which he was giving to you would be of great service to the United States?

The Attorney General. I think I must object to that question, if the Commission please. I do not think we can permit that question.

Colonel Royall. If the Commission please, I also object.

The President. Both the defense and the prosecution object.

Colonel Ristine. I noticed that situation, if the Commission please. It does seem to me that a person who has talked with another over a long course of time, four or five days, could state to the Commission the appearance of the witness as to truthfulness and willingness to communicate valuable facts. I know of no other way to get it in, except that the person who participates in the conversation be permitted to express his opinion as to the appearance of the witness and whether or not the witness appeared to be truthful and sincere. I think that on a previous occasion a similar question was objected to, and the Commission ruled that he could express his opinion because the question called for a state-

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ment of fact, the fact being whether or not the person appeared at the time to be sincere and truthful. I think it is a matter that is competent in evidence.

The President. Since both sides object to it, I would like to hear any remarks they care to make.

The Attorney General. I take it that this witness was called to testify to facts. He is not an expert who can testify to conclusions. That is a matter for the Commission. This witness testified to the facts that Dasch told him. I think that to ask him whether or not in his opinion Dasch was sincere is, on its face, a most improper question.

The President. I will ask the reporter to read the question.

The Reporter (reading):

"Q Did it appear to you in your many discussions with Dasch that he was a sincere and truthful person and that the facts and material which he was giving to you would be of great service to the United States?"

The President. I think you may ask him the question as to the first part, "Did he appear to you sincere?", and so forth.

Questions by Colonel Matine:

Q In these discussions with Mr. Dasch did it appear to you that Mr. Dasch was sincere and truthful in relating the events?

A That question cannot be answered yes or no.

Q Answer it in your own way.

A When I was first talking with Dasch I had the impression that he was sincere and truthful in what he was saying. There are many things that have arisen since which

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have now made me wonder, so that I do not know whether he was or he was not. For instance, he at one time stated that under no circumstances must it be known that he had come to the F.B.I.; that if Germany found out about it his mother and father and relatives in Germany would be immediately killed, and that was of primary importance to him. Later I am told that he did not--

Colonel Royall. May it please the Commission, I certainly object to the witness saying what somebody told him. All of this evidence is being admitted against the other defendants. I have no idea what his answer is going to be, but if you just let him wander afield we will never know what we are doing here. That is the difficulty of asking for conclusions. I have no idea of what he started to say, but since this testimony is being received against all of the defendants, there certainly ought to be some relation between the knowledge of the witness and the testimony. He ought not just to be permitted to answer questions and form conclusions and make arguments. The answer to the question asked calls for just that sort of an answer, and that is the reason we object to it.

Colonel Ristine. I do not believe the question was broad enough to cover any opinion which the witness may have formed after his interrogations of Dasch. It was directed solely to knowledge he gained from the interrogation of Dasch, and I do not think it should be qualified by the witness, because after he concluded the interrogations somebody else told him something which caused him to re-evaluate the situation. I think he has already answered that during the course of the interrogation he formulated a definite opinion that Dasch was

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sincere and truthful. I was not insisting upon the witness giving us any matter which relates to what somebody told him after the interrogations were concluded.

The President. Have you any further remarks?

Colonel Royall. No, sir, except to object to the question.

The President. Do you object to the whole question and its answer, or do you want to strike out a part of the answer?

Colonel Royall. We have objected to the line of inquiry, but it would be satisfactory to us if you just stop right there. We will not move to strike out anything. He has not said anything so far, but I am afraid of what he might say.

The President. I would suggest that further questioning on this line be put in the form of a direct question, and we will give either side an opportunity to object if they wish.

Questions by Colonel Ristine:

Q Mr. Traynor, I believe you did tell Dasch in the course of your several days interrogation of him that you believed in his sincerity and his truthfulness. That is correct, is it not?

A That is correct.

Q Did you tell Dasch about the apprehension and arrest of five of the others who are now on trial?

A I told him they had been taken into custody; yes, sir.

Q Did you then ask him if he could give further and additional testimony respecting the other two?

A I did.

Q Did he give you such information as he thought would be helpful in the apprehension of the other two?

Colonel Royall. Objection, if the Commission please. He is asking for a conclusion.

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Colonel Ristine. Let me ask it this way.

Questions by Colonel Ristine:

Q What did Mr. Dasch tell you?

The President. Do not answer until we get the tenor of the question, please.

Colonel Ristine. That is with respect to aiding in the apprehension of the other two. I am just asking him to relate what Mr. Dasch said.

The President. All right, if there is no objection.

Questions by Colonel Ristine:

Q If you can recall what was said.

A May I have the question clarified at this time to advise me exactly when you have reference to; that is, at the time that I told him of the apprehension of the other five or during any time that I was questioning him.

Q At the time you asked him what information he might give respecting the apprehension of the other two.

A He advised me that he had furnished me with all the information that he had, previously.

Q Had he previously furnished you information which he thought would be helpful in the apprehension of the other two?

A He had.

A Member. That is an expression of what he thought. It is the same thing that we talked about a moment ago.

Colonel Ristine. I would be pleased to have the witness tell us what he said that he thought would be helpful in the apprehension of the other two.

Questions by Colonel Ristine:

Q Just relate what he said, if you can recall, Mr.

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Traynor.

A Generally, he furnished information on Neubauer, as to what his name was, his description as best he could recall it. He identified a picture from our files and stated that he had a wife who had relatives in Chicago and that he thought he would go to Chicago. He also furnished the name of Haupt and that he had parents in Chicago and that he would probably go to Chicago, as well as furnished a description of Haupt as best he could recall it.

Q And those were the two that were not apprehended at the time you related to him that the five had been taken into custody?

A That is right.

Q Did Dasch have a conversation with you in which he expressed a desire to be placed in the same jail in New York with the other ones who had been apprehended, so that they would not know that he had acted in the capacity of an informer?

A I do not recall that he expressed a desire to be placed in a jail in New York, but when he first came into my office, shortly after the conversation started, he did express the desire to be thrown in the same concentration camp with the rest of them, so that they would not know that he had furnished information.

The President. We will pause now and take a recess for luncheon. It is nearly 12:45. We will meet again at 2 o'clock.

(Whereupon, at 12:45 o'clock p. m., a recess was taken until 2 o'clock p. m.)

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A F T E R R E C E S S

(The Commission reconvened at 2 o'clock p. m., upon the expiration of the recess.)

The President. The Commission is open.

Colonel Munson. The full personnel of the Commission, the eight accused, the personnel of the prosecution except Mr. Rowe, and the personnel of the defense except Captain Bruton, and the reporter are present.

DUANE L. TRAYNOR

the witness on the stand at the time of the noon recess, resumed the stand, and the following occurred:

Colonel Munson. The witness is reminded that he is still under oath.

The Witness. Yes, sir.

Colonel Ristine. If the Commission please, I should like to be permitted to interrogate this witness with respect to the subject matter he had in mind when he said that he had believed that Dasch was telling the truth and was sincere until he had heard something subsequent to this period of interrogation. I do not know what the answer of the witness would be, but I am afraid that the Commission might draw an improper inference that there is not full disclosure with respect to that matter. I should like to have the witness permitted to make the explanation that he was not permitted to make before the noon recess.

The President. My remembrance is that there was objection to that on the part of your colleague.

Colonel Ristine. That is correct.

The President. And also on the part of the prosecution.

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Colonel Ristine. That is correct, I think.

The President. I made the remark at that time, I think, to give you the opportunity of interrogating the witness, that you might by particular questions bring out what you wanted and that that would possibly do away with the objections that had already been made. But that is entirely your responsibility. It seemed to me that you might pose your questions in such forms that they would be direct questions, possibly, that would not require the witness to refer to the reporter to find out whether there was a question or a statement.

Colonel Ristine. I will try to develop it along those lines.

The President. Please do.

CROSS-EXAMINATION--Resumed

Questions by Colonel Ristine:

Q Mr. Traynor, would you please explain to the Commission what it was that caused you to say that you doubted or wondered about the truthfulness of Mr. Dasch's statements, which developed following your conference with Mr. Dasch?

Colonel Royall. May it please the Commission, we shall have to object to that as a question capable of being answered by a narration covering almost any field. It goes into the mental processes of this witness, and where those processes might extend, I am unable to know.

I should like to ask this witness a question before he answers, to see how far he will go. We have no objection if the answer does not relate to the other defendants. May I inquire?

The President. Yes.

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Question by Colonel Royall:

Q Does your answer involve any statement with reference to any of the other defendants?

A It does not.

Colonel Royall. All right.

The Attorney General. I have no objection.

Questions by Colonel Histine:

Q Then, you may proceed, Mr. Traynor.

A One of the things which made me doubt the truthfulness of Dasch's statements was that when he was in my office and being questioned, he told me that under no circumstances must the German Government learn of his part in this proceeding; otherwise they would immediately kill his mother and father, who were both over 70, I believe he told me, and his other relatives in Germany, and he showed great concern over those people.

Later, when he was up in New York City, he changed his mind and decided that it would be perfectly all right for the world to know about his part in these proceedings and that his mother and father and his relatives in Germany would have to look out for themselves; that his mother knew what he was going to do and she had utmost confidence in him and told him to do the right thing.

When I found that out, why, I was a little bit doubtful in my own mind as to what was the truth and how much of what he had told me was the truth.

Q In connection with what did he change his mind? Or with regard to what? What gave rise?

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Colonel Ristine. I will withdraw that.

Questions by Colonel Ristine:

Q On a Sunday morning preceding his decision not to enter a plea in order to protect his father and mother, the newspapers did carry in big headlines the story of the arrest and apprehension of eight spies and confessions by them, did they not?

A I think you said the Sunday preceding. Did you mean the Sunday subsequent?

Q I think it was the same Sunday.

A Subsequent?

Q Yes.

A The Sunday subsequent to his agreeing to this, the newspapers did carry such a story.

Q He had agreed to enter a plea which he at the time said was not true in order to protect his father and mother, had he not?

A He had.

Q That was for the purpose of preventing that knowledge from getting back to Germany; that is true, is it not?

A It was.

Q When the Sunday morning papers came out with the headlines showing the apprehension of these people and that confessions had been made, the news was already out and it would get back to Germany; is not that correct?

A That is not correct. The headlines carried the story of the apprehension of all eight men. The story indicated that Dasch was picked up and arrested subsequent to the apprehension and location of some of the other men.

Q Well, at least, the newspapers were not furnished

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to the defendants; that is true, is it not?

A I don't know as to that; I wasn't there.

Q Well, don't you know as a matter of policy that from the time they were taken into custody down to the present they have not been furnished any newspapers?

A My understanding is that Dasch, at least, was furnished newspapers. I do not know about the rest of them.

Q Up to what time?

A That I do not know. I know that he did see the stories in the newspaper about the apprehension of all of the eight men.

Q Don't you know that he just saw the headline out in the corridor from where he was incarcerated in New York on that Sunday morning and that he did not have a newspaper in his possession at all?

A I understood that he had a newspaper in his possession. That may not be the fact, but that is my understanding of it.

Q But it was the change of his mind respecting the entering of the plea of guilty that caused you to wonder about the correctness of his other statements, was it not?

A It was.

Q Will you tell the Commission of any instance in that 254-page statement where the F. B. I. has checked or double-checked and found an inaccuracy with respect to that entire document? Can you tell us of any instance where he made any misstatement?

Colonel Royall. May it please the Commission: May I again ask the witness a question?

The President. Yes.

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Question by Colonel Royall:

Q Will your answer relate to any of the other defendants?

A It will not.

Colonel Royall. All right, sir.

The Witness. The 254-page statement of Dasch--all of the statements contained therein have not been checked as yet. Anything that we have checked has been found to be the truth.

Colonel Ristine. I think you may inquire.

Colonel Royall. I do not care to ask any questions.

The Attorney General. I have just a few questions I should like to ask, with the Commission's permission.

REDIRECT EXAMINATION

Questions by the Attorney General:

Q Dasch told you he had landed on Long Island early in the morning of the 13th of June, did he not?

A He did.

Q He first mentioned Burger's name and address, as I understand it, at 11:30 on the night of June 19; is that correct?

A That is correct.

Q When did he mention the names and localities of the other defendants to you for the purpose of finding them?

A He mentioned them several times during the days he was questioned. He mentioned their names--at least, their aliases--on the 19th, and furnished more detailed data as to the other names and identities on the 20th.

In the case of Werner Thiel, it was about the 22nd before he furnished the true identity of that man's name,

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although he had gone over to San Francisco and gone over to Germany from San Francisco with Thiel.

Q What, precisely, did he say to you with reference to what he had told his mother about his intended trip to America?

A He told me, with respect to his mother, that he had not told her what the real purpose was--that he was coming over here as a saboteur--but he had indicated to her that he was going to South America to work on propaganda for the German Government, and that she did not know his part in coming over here as a saboteur and fighting the German Government from the United States.

Q Were there any other occurrences that you have not mentioned which occurred after Dasch's statement to you and signed confessions which made you doubt anything that he told you?

A One of the things which made me doubt the things he told me was the fact that in his statement and in his talks with me, he has never satisfactorily explained why it was that he waited from June 13 until June 19 to notify us of the landing of these people. Had he told us on the 13th or the 14th, when he first called our office in New York City, it would have been possible not only to have apprehended the group that was landing in Florida but to get the submarine, as well--the submarine and its crew.

Had he come in and told us where Burger was on the 14th--Burger, when first questioned, told of the landing of another submarine at Cape Hatteras, which would have probably landed about the 15th of June, and it would have been possible for

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us to also have put out a warning to the Navy in order that it might also have made an effort to apprehend this crew and the submarine.

The Attorney General. That is all.

REGROSS EXAMINATION

Questions by Colonel Ristine:

Q You did know that the next morning after the landing, or the next day after the landing, Dasch called the New York office of the F. B. I. and advised them that on Thursday or Friday of the week following he would come to Washington and was going to make full disclosure of the information to Mr. Hoover, did you not?

A I did.

Q You think it is strange, in view of what has actually happened to Dasch, after he took four days to think over the method by which he would present the matter, that he just did not, as soon as he landed, run right into the F. B. I. office?

A I do. He had a whole three weeks on the submarine to think over what he wanted to say.

Q Did you not know that when he came to Washington he still was doubtful in his mind whether this matter should be taken up with Army Intelligence or F. B. I. or the Attorney General personally?

A He did not know exactly what agency he wanted to talk to when he came to Washington, but he indicated he wanted to talk to the F. B. I. by calling the F. B. I. office on Sunday, the 14th.

Q Did you not know that before calling the F. B. I. office in Washington, he had called the Bureau of Information

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of the Government in order to ascertain the proper ones to call?

A That is what he told me.

Q Did you not know that before calling the F. B. I., he called Colonel Kramer in Army Intelligence?

A That is what he told me.

Q Then, having failed to reach Colonel Kramer, he called the F. B. I.; is not that correct?

A That is what he told me.

Q Mr. Traynor, when the proposal was made to Mr. Dasch that a plea be entered, coupled with the probable duration of his incarceration of six months, undoubtedly the F. B. I. did not consider that he was guilty with these other people, did it?

A We knew very definitely he was guilty with the other people--that there was violation of the law--because he had participated therein.

Q Do you mean to tell this Commission that in the estimation of the F. B. I., six months' incarceration was a suitable punishment for a man who was guilty--equally guilty--with these other defendants?

A There was nothing ever said that he would be incarcerated for only six months.

Q Do you mean by that that there was nothing said by you?

A I know of nothing said by anybody that he would be incarcerated for only six months.

Q You have not been present in the courtroom while the testimony was given, I take it?

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A No, sir.

Colonel Ristine. I think that is all.

CROSS-EXAMINATION

Questions by Colonel Royall:

Q I should like to ask a question or two. Mr. Traynor, Dasch did tell you that Burger was waiting in New York to hear from him--that is, Dasch; is that right?

A That is correct.

Q He also told you that Burger was present when he, Dasch, communicated with the F. B. I. on June 14, did he not?

A That is correct.

Q You were not present at any time during the examination of Mr. Burger, were you?

A I was not.

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Q Now, you spoke a moment ago of some statement that Mr. Burger made relative to some submarine landing on Cape Hatteras. He did not make any such statement to you, did he?

A He did not.

Colonel Royall. May it please the Commission, we would like that stricken from the record. The question did not indicate that that would be brought out. There is nothing in the testimony, as we recall it--and we have checked on it--to that effect, and the fact that somebody may have told him that Burger said that, if he did--we think it was a mistake. We do not think he said, but if somebody told him that--it would be incompetent, and I think the Attorney General would recognize that to be a fact. So we would like that remark stricken.

The President. If there is no objection, that will be stricken.

Questions by Colonel Royall:

Q Mr. Traynor, did you ever see the defendant Burger to talk to him at all?

A No, sir.

Q I knew you were not present during his examination, but I did not know whether you had seen him otherwise and discussed it with him later.

A I have never talked with the defendant Burger.

Q Have you had occasion to investigate the facts stated in his statement?

A So far as I know, we have checked only one thing that Burger has told us, and that was, of course, not in his statement.

Q Do you mind telling me, not what you found out, be-

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cause that would not be competent, but what did you check?

A We checked on a story of his relationship with a girl by the name of Eva Schuetz.

Q You yourself have not talked with Eva Schuetz, have you?

A I have not.

Q She did know Burger?

A She did.

Colonel Royall. May it please the Commission, in connection with the objection I made a moment ago, I did not want it to appear that Burger had made conflicting statements unless he actually had, and it appears from the statement he made that the reference to another submarine is on page 49 of his statement, to the effect that another submarine had left for the United States with two naval experts aboard, who would be landed in the vicinity of New York, which is not Hatteras, and I just wanted to call that to your attention.

Questions by Colonel Royall:

Q Mr. Traynor, I believe it is a fact that the defendant Burger made a full statement, dated June 23. Do you know about that or have you read it or seen it?

A I have seen it. I have never read it.

Colonel Royall. That is all I care to ask.

The Attorney General. There are just a few more questions I might ask the witness.

FURTHER REDIRECT EXAMINATION

Questions by the Attorney General:

Q Dasch came to see you on Thursday?

A No, sir. It was Friday.

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Q Friday. He had been in New York, according to his statement, on Monday, Tuesday, and Wednesday, had he?

A That is correct.

Q Did he tell you what he did Monday and Monday night?

A He did.

Q What did he do Monday and Monday night?

A Monday was spent in buying clothing, clothes for himself, as I recall it.

Monday night I believe he went out to dinner with Burger and possibly he met Heinck and Quirin--I am not quite clear on that at the present time. Thereafter he left them and went to some waiters' club which he had formerly been a member of when he was in the United States before.

Q He went there Monday night?

A Monday night.

Q What did he do there?

A He visited, talked with various people there, stated he played cards, some sort of a gambling game, on Monday, stayed there all day Tuesday and all Tuesday night.

Q You mean all Monday night?

A All Monday night.

Q And all Tuesday?

A All day Tuesday and Tuesday night.

Q What did he do Wednesday?

A As I recall it, Wednesday morning he left the club and went back to his hotel, where he went to bed and stayed in bed part of the day, then got up and went shopping again with Burger, as I recall.

Q What did he do Wednesday night?

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A Wednesday night he went to bed at the hotel.

Q And left for Washington sometime on Thursday afternoon?

A That is correct.

The Attorney General. That is all.

FURTHER RECROSS EXAMINATION

Questions by Colonel Ristine:

Q I believe, Mr. Traynor, when he talked to the F.B.I. Sunday he told the New York office of the F.B.I. that he would come to Washington the following Thursday or Friday?

A That is correct.

Q And he asked that the F.B.I. notify the Washington office of his coming, did he not?

A That is correct.

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Q And they did not think seriously enough about the matter even to notify the Washington office, did they?

A That I do not know.

Q Well, they did not notify the Washington office, did they?

A I have previously testified, sir, that, so far as my own knowledge is concerned, they never had.

Q Now, don't you know that Mr. Dasch bought some clothing for the trip to Washington and that he could not get delivery of the alterations on that clothing until Thursday?

A I do not know that.

Q Now, didn't he tell you that on Thursday he went down to the store and got the clothing which he had previously ordered and which had been altered?

A I believe he told me that.

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Q And wore that clothing to Washington on Thursday?

A I do not know about that, sir.

Colonel Ristine. I think that is all.

The Attorney General. That is all, so far as we are concerned.

The President. Are there any questions from any member of the Commission?

There seem to be none. The witness is excused.

Colonel Ristine. If the Commission please, there was some reference made during an argument respecting the admissibility of the entire Dasch statement in which the Attorney General referred to the fact that I was desirous of getting that statement in its entirety so that it would not be necessary to call Dasch as a witness.

I am sure the Attorney General did not intend to go contrary to the court martial rules, that no reference should be made to a defendant's failure to take the stand or with respect to his intentions of taking it or not taking it; but I do move to strike that out of the record as being an invasion of the guarantee which surrounds every accused. I mean that if he does not take the stand, no comment can be made or inference be drawn from that fact; and if that be true, of course it would be more prejudicial still to assert such intentions.

I also wish to assure the Commission that I was attempting to get the entire statement in not for the purpose of being relieved of the duty of placing Dasch on the stand, but for the sole purpose of permitting this tribunal to place the proper interpretation upon what had been said--in other words, that

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you might have collectively everything that he said for himself, as well as that which the other side construed as being against his interest.

The Attorney General. I understand that the motion is to strike from the record something that I said with reference to the confession. I see nothing improper in what I said, and therefore I see no reason why it should be stricken. I think it is comparatively unimportant, but I see nothing improper in what I said. Therefore I see no reason why it should be struck from the record.

Colonel Ristine. I would just like to call the Commission's attention and the Attorney General's attention to what the Manual says respecting the accused taking the stand or not taking the stand:

"The accused is, at his own request but not otherwise, a competent witness. His failure to make such request shall not create any presumption against him."

Now, if the Commission please, that is clear. The accused may, at his own request and not otherwise, take the stand. If he makes no such request, no one is entitled to draw any presumption respecting his failure to make the request.

Now, what does the Attorney General do? The Attorney General, in order to keep the entirety of that statement out of the record, openly asserted to this Commission that it was an attempt on the part of the defense to get into the record a self-serving statement, so that the defense would not be compelled to put the accused on the stand; and I say it was highly improper to make any such reference or any such argument,

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and I move that it be stricken from the record.

The Attorney General. I do not care to add anything.

The President. I remember the statement, but I would like to be definite about it and have Colonel Ristine tell us the page of the proceedings, so that we can look it over and give a decision on that.

Colonel Ristine. If the Commission please, I do not know the page. I know in connection with what argument it came up. I would have to look it up before I could advise you of the page.

The President. The Commission will close for the moment.

(The Commission was then closed. When it reopened the following occurred:)

3 The President. The Commission is opened. The Commission rules that the statement of the Attorney General to which the defense counsel, Colonel Ristine, referred shall be struck from the record.

The Attorney General. Do counsel wish to call any more witnesses for examination?

Colonel Ristine. I think not.

The Attorney General. The prosecution rests its case.

MOTIONS FOR VERDICTS OF NOT GUILTY

Colonel Royall. May it please the Commission, the defendants represented by Colonel Dowell and myself desire to make certain motions for verdicts of not guilty. We desire to present them in this order, if it is agreeable, and I would like very much, if the Commission thinks proper, to dispose of them separately, because if that is not done it possibly works to the injustice of one of the defendants whom we represent

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and who is entitled, I think, to separate consideration of his motion.

I do not assume that you would have any particular objection to that procedure.

Now, we first, on behalf of all the defendants whom we represent except the defendant Burger, with whom we will deal separately, desire to make a motion for a verdict of not guilty on certain of the counts.

In this connection it is not my purpose to dwell at any length on this part of the motion, because, in frankness to the Commission, the decisions which you have made heretofore on our motions to strike would probably dispose of the matter adversely to our contentions, and we are not interested in just making motions to make them. We want to make only those which we feel have some merit and some possibility of a favorable ruling in light of the previous action of the Commission.

There are four charges against each of the defendants. As I said a moment ago, this motion is on behalf of Herbert Haupt, Heinrich Harm Heinck, Edward John Kerling, Hermann Neubauer, Richard Quirin, and Werner Thiel. There will be a slight difference between the cases of those other than Haupt and the case of Haupt, and so I will talk about that first.

Charge 2 deals with the violation of the 81st Article of War, and without reading it in full, the charge is relieving or attempting to relieve enemies of the United States. We conceive that that offense cannot be committed in the case of a German citizen, because it cannot be an offense for a German citizen to relieve Germany any more than it can be an offense for an American citizen to relieve America.

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The 81st Article of War, as we conceive it, is directed to a citizen of this country relieving the enemy; and of the group of which I am speaking only Haupt is a citizen of this country. The other five are citizens of Germany, as the evidence has disclosed.

We mentioned that argument on the motion to strike; and in mentioning it we called attention to the fact that at that time there was no evidence to determine which were citizens and which were not citizens. That evidence has now been adduced by the prosecution, and it affirmatively appears that the five defendants, Heinck, Kerling, Neubauer, Quirin and Thiel, were citizens of Germany and, therefore, could not, as we conceive it, be guilty of any offense under the 81st Article of War. That charge has nothing to do with the other charges in this case which inject other elements. The Article of War in question is against relieving or attempting to relieve an enemy of the United States. The Article of War itself does not provide anything more specific than this (reading):

"Whoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct."

If that meant that it was a crime for a German citizen to help Germany, then every German soldier, if there were an invasion of this country, in uniform, would be guilty under that section and be punished by death. That cannot be the meaning of it. This Article of War does not involve a secret

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or covert offense, and does not require that element. It says, "Whoever relieves or helps the enemy." Therefore it does seem to us that clearly the citizens of Germany cannot be guilty of an offense under that Article merely because they help Germany.

We have tried to find some authorities on that. I confess that our knowledge of military law is not nearly so wide as that of the prosecution. However, we have not been able to find any case where a resident of a belligerent nation was found guilty of violating Article 81 in helping his own country. If the prosecution has any authority on that contrary to our view, it ought to carry weight with the Commission, and of course it will carry weight with the Commission; but in the absence of such specific authority, the meaning, it seems to us, is pretty obvious, that it cannot apply to a German helping Germany. That is not a case that involves any element of spying or sabotage. It merely involves the element of aiding a particular country; and it is perfectly apparent that some methods of aiding would not be a crime under our law, if a German aided Germany; and this Article does not attempt to discriminate between doing it secretly or in uniform, or anything of that kind.

We think, therefore, that Charge No. 2 should be dismissed as to the five defendants whom I have named.

We brought that up on the motion to strike; and the only reason that I am referring to it again is that at that time we called attention to the fact specifically that the evidence had not disclosed which were citizens and which were not citizens, and therefore the motion probably did not lie. You will find that in the record. Therefore we repeat it now when the

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evidence does disclose that difference.

While we also move for dismissal of the other charges against these defendants, we frankly state to the Commission that these motions have in substance been made before on the motion to strike, except as they relate to spying. Therefore the Commission will, I assume, be entirely consistent and deny the motions on the other charges because the matter has been considered by the Commission and the Commission has ruled against us. However, we think that our grounds of the motion to strike were proper, and we will not repeat them here, knowing that the motions will probably not be granted, and not wishing to burden the Commission with any argument thereon.

Now, as to all six of these defendants, we do move to dismiss the third charge, which is a violation of the 82nd Article of War. The 82nd Article of War reads as follows:

"Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general Court-Martial, or by a Military Commission, and shall, on conviction thereof, suffer death."

In the Manual for Courts-Martial is carried this notation based upon the opinion of Attorney General Gregory:

"A person apprehended upon United States territory not under martial law, who had not entered any camp, fortification, or other military premises of the United States and who had not come through the fighting lines or field of military operations, cannot be tried as a spy by a military tribunal, and to such a case Section

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1343 of the Revised Statutes and A.W. 82 cannot constitutionally be applied."

The word used in the statute is "spying"; and spying has been rather clearly defined by The Hague Tribunal and by the Rules of Land Warfare, which are promulgated by the Army.

The Rules of Land Warfare, in Section 204, say this:

"The definition embodied in The Hague Regulation and that contained in the 82nd Article of War both include persons of all classes, whether military or civilian, without regard to citizenship or sex. Both likewise apply only where acts are committed in time of war.

The Hague definition applies only where the information is obtained or sought in the zone of operations, while the statutory definition is not so limited. The latter, however, includes only persons found lurking or acting as spies in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States or elsewhere, and the phrase 'or elsewhere' as here employed has been held not to justify trial by military tribunals of persons charged with acts or offenses committed outside of the field of military operations or territory under martial law or other peculiarly military territory except members of the military or naval forces or those immediately attached to the force, such as camp followers. Persons charged with espionage committed in the United States, outside of military jurisdiction, are nevertheless liable to trial and punishment by civil courts under the espionage law."

The authorities further say that in further analysis of

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this provision as to spying there are three necessary elements; and that is embodied in the definition of "spying" in The Hague Tribunal and in the definition of "spying" as carried forward in the Rules of Land Warfare.

There must be, first, some clandestine conduct or some false pretense.

Second, it must be in the zone of military operations; and

Third, it must be with the intent to communicate military information to the enemy.

There cannot be any question but that the prosecution has proven the first of these requisites--that it was done secretly and clandestinely. But of course they have got to prove all three.

There is, in our opinion, a serious question as to whether they have proven the second element, that is, the zone of operations. They have put in evidence a map or chart of the Eastern Military Area and the Southern Military Area, and a separate chart of a particular portion thereof. But their testimony also discloses that every part of the United States is in one defense area or another; and therefore the mere fact that this was in the Eastern or Southern Military Area does not prove any more than if it was in the Mississippi Area, if there is one by that name.

So we say that they have not proven that this was in the zone of military operations.

I must be frank with the Commission and say that their argument does not end there. They say that there was a patrol by the Coast Guard along the beach. It appears, however, that it was an unarmed patrol, and that, therefore, it was

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not a military operation. They sought to fortify that by putting some military man on from the beach somewhere near Amagansett. They did not offer such information as to Florida. They did that because, I suppose, they realized that an unarmed patrol along the beach could hardly be called a military operation. I do not know any other reason that they offered it. If it had been sufficient to prove an unarmed patrol, they would not have gone to the trouble of offering the other evidence. When that evidence went on we found it was a Signal battalion, and we asked the witness if they would go to the aid of the patrol if needed, and he said they would; and on cross-examination he said they would aid anybody else that needed them. But there was no suggestion that that was a combat force or that there was any combat force anywhere in the vicinity of these occurrences.

Therefore we say that there was no such zone as The Hague Tribunal and the Rules of Land Warfare prescribe as necessary before a person can be guilty of spying.

The third requisite is that it must be for the purpose of giving military information to the enemy. I do not believe that this evidence remotely shows that. These people came over here, according to the prosecution's testimony, for the purpose of sabotage, and not spying. The F.B.I. recognized that to be the fact, because they used the word "sabotage", both on the witness stand and in every question that they asked the defendants in taking their statements; and you will not find in all these voluminous statements any other descriptive term used, so far as I recall. If there are any, it would be one or two isolated instances which I do not recall.

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I confess that we might have used in one or two instances some other term, but we used the term generally used, and the agents stated that that is what they considered it to be-- an attempt to commit sabotage.

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I am not contending that entering this country for the purpose of committing sabotage is not a crime. That does not arise at this time. It probably arose in the earlier motion. But we are contending at this time that that is not spying.

There are two other things we have to deal with in that connection--and I am trying to cover what I think the prosecution may say, for they may bring up points that I did not anticipate. However, they have put in two classes of evidence. One that they put in was the writing on this handkerchief; that is, that there was an address there in Lisbon, and I do not think that we can properly deny that Kerling and Dasch had addresses in Lisbon and that under the plan they would, under some circumstances, transmit some information to Lisbon.

In frankness to the Court, I should say further that the particular fact that the other defendants did not themselves communicate it would not entirely answer as to them, because a communication through a leader of a group, if the members of the group knew that it was to be done, would be tantamount to communication by the man himself. The fact that it went through one more step would not mean that it was not a communication.

We also have from the prosecution's standpoint the fact that they were taught or given some instruction in secret writing. That is the unfavorable side from our standpoint. On the other hand, the evidence discloses no more than this about this communication, as I recall it. In that long Dasch statement there may be something else--I cannot undertake to remember it all--but, as far as I recall--if I am wrong, I want to be corrected--the only information that was to be

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given by the leaders was information as to whether they needed other explosives, whether they needed other registration cards, and whether they needed other money. If that was the sole purpose--I do not think the evidence goes any further than that; if it does, I do not recall it right now--that would not be spying, as we contend. That is an entirely different sort of ^{of} defense than it would be to report on the fortifications, encampments, and military operations of the country. There is no evidence, as I recall it, tending to indicate that that was ever contemplated.

Article 32, as we understand it, as set out in the Hague Tribunal, in the Rules of Land Warfare, provides that in order to constitute spying it is required that some information as to our military secrets and operations be given.

As to the secret writing, that communication was merely between members of the group, and I think the testimony shows that without exception. I believe all the testimony so states. In the case of certain of the defendants, the evidence is that they did not even know about the addresses in Lisbon or anything about the method of communicating.

There is another circumstance that shows that this was not spying. It was originally contemplated that some of these people learned radio, but that was abandoned at the school because this was to be merely a sabotage group and nothing else.

It is a matter of considerable moment to these defendants whether this is spying or not. For any other offense that is charged here, the matter of punishment is discretionary. But

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if these people are properly tried or convicted upon a charge of spying, the sentence is mandatory.

All of us lawyers know that a penal or criminal statute or provision must be strictly construed; you cannot read a crime into something; you cannot construe a crime into a statute; the statute has got to provide for it. In Article of War 82 when it says, "as a spy," "lurking as a spy," "acting as a spy," we have got to take the word "spy" as it is defined by international law and by our own rules of land warfare. We say that, as so defined, it does not mean coming over here for the purpose of sabotage. We have not been able to find anything that indicates that that is the meaning. Yet that is what every F. B. I. agent and every witness construes this plan to be.

I want Colonel Dowell to submit a few remarks on this very important question. In concluding my remarks, however, I want to say merely that of the three requisites of spying, one is deception, which certainly existed--we cannot deny that; the second is zone of military operations, which we say does not exist in this case--there is no evidence of it; and the third is intent to transmit military information to the enemy, and there is no evidence of that. If any one of those requisites is lacking, then the offense is not properly proved. It is a vital matter or question in this case. The testimony of the prosecution is in, and if this charge of spying is found supported by the evidence, it makes a considerable amount of difference. If it is not, it is a matter, we think, discretionary with this Commission on the matter of punishment if any of these defendants are convicted.

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I have failed to say one thing that I meant to mention. Charge 3 says, "communicating among themselves." That is not spying, as we understand the term to be. That was put in there probably because they felt it was necessary so to allege, but the mere fact that it is put in the charge as an element does not mean that it is proved in accordance with the statement in the Article of War. They have got to meet the requisite of that, and we say they have failed in two particulars.

We hope that the Commission will adopt this course: that as to the German citizens--that is, the five German citizens for whom I am now speaking--on the second charge and specification they be given a verdict of not guilty; and that as to all the defendants on the third charge and specification, relating to spying, they be given a verdict of not guilty.

I should like to have Colonel Dowell say a few words.

Colonel Dowell. May it please the Commission: I have two observations to add to what Colonel Royall has already said. One is that in the language of the Courts-Martial Manual the elements of proof required for proving the crime of spying, as appears under the 82nd Article of War, are as follows. This appears on page 157 in the discussion under the heading "Being a Spy." This is the proof required for a court-martial and, I take it, the proof required for a military commission, also, because they are mentioned jointly in that same article.

"(a) That the accused was found at a certain place within our zone of operations, acting clandestinely, or under false pretenses; and

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"(b)--

and this is the statement to which I invite particular attention--

"that he was obtaining, or endeavoring to obtain, information with intent to communicate the same to the enemy."

The word "endeavoring," I take it, in this sense is used in the sense of an attempt. There are only very minor technical differences between an endeavor and an attempt appearing in the legal dictionaries.

An attempt to commit a crime must be an effort in something that, if continued to its completion, would result in the crime itself. Discussion appears on page 190 of the Manual for Courts-Martial, and also the definite statement that mere preparation to commit a crime does not constitute an attempt. We submit that in this case there was preparation but no attempt or endeavor to commit the crime of spying.

The President. Colonel Ristine, have you any remarks to make?

Colonel Ristine. If the Commission please, I should later like to make a separate motion with respect to my client.

The President. You have no remarks on this?

Colonel Ristine. I have no remarks in connection with this.

The President. The Judge Advocate General.

REPLY TO MOTIONS FOR VERDICTS OF NOT GUILTY

The Judge Advocate General. May it please the Commission: I do not understand from counsel's remarks at the outset whether he has distinguished between his motion on the 31st Article of War and his other motion; whether he said one

was really a motion on which he believed he had an argument to make, while the other was a motion he was making pro forma, as it were, which he expected this Commission to overrule as a matter of following earlier rulings.

If it is the latter, which applies to the 82nd Article of War, I do not want to take up the time of the Commission to discuss it. But I do want to say at this time that it seems to me that the argument of the defense is more properly made coming at the close of his case, going to the merits of the situation, rather than as a motion to bring in a finding of not guilty at the end of the prosecution's case. In the first place, the Manual for Courts-Martial, paragraph 71 d, referring to this, says:

"The court will determine the matter as an interlocutory question. If there be any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tends to establish every essential element of an offense charged or included in any specification to which the motion is directed, the motion as to such specification will not be granted."

The Federal rule is that where the defense moves for a directed verdict, the view of the evidence and the inferences reasonable to be deducible therefrom which are most favorable to the prosecution must be accepted by the court in determining whether the prosecution has established its case.

As I say, this argument of defense counsel appears to me

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to go to the merits of the matter rather than to whether the prosecution has made out any case at all, and that is all that is before this Commission at this time.

With reference to the 31st Article of War, I was a little surprised at the ingenuity of the argument which says that "whoever" did not include everybody in the world. Counsel says he would like to have some case on this point if we have it. We do not have it, because no such case has ever come up. But if you follow counsel's argument and say that "whoever" applies only to American citizens, you come to the absurd situation whereby a German citizen in this country, living here, who might give this dynamite or whatever it might be to these saboteurs who came over here could not be tried under the 31st Article of War. That would be the case if, instead of these men bringing this over themselves, some German here had done it.

In the next place, it says, "Whosoever relieves or attempts to relieve."

In the next place, we do not admit under the evidence that these two men referred to are American citizens. That is another question, which we shall go into later. We claim at the present time that they have lost their American citizenship.

In the same connection, under the 32nd Article of War, as to spies, it says, "Any person who in time of war." Going back to the 31st Article, as to "whosoever," there is no claim on the part of the defense that "any person" means an American citizen; otherwise it would make the 32nd Article of War useless. I see no more reason why there has to be any distinction between an American citizen under the 31st Article than under

the 82nd Article of War.

Speaking of that, under the 82nd Article, counsel has referred to an opinion of the Attorney General, quoted from the Syllabus, in 31 Opinions of the Attorney General 356, which is the case of Waberski, tried on the Mexican Border in 1917 or 1918. That opinion is a printed opinion of the Attorney General, and it states that under the facts as then set before him:

"A person apprehended upon United States territory not under martial law, who had not entered any camp, fortification, or other military premises of the United States and who had not come through the fighting lines or field of military operations, cannot be tried as a spy by a military tribunal * * *"

As to that very same case, though not a published opinion of the Attorney General, under date of December 24, 1919, Attorney General Palmer said:

"It appears that my predecessor acted upon the assumption that Witcke, who came from Mexico, was a Russian National, and that he was arrested immediately upon setting foot on our territory. You now state that Witcke was a German citizen; had crossed into our territory at least three times within twenty-four hours, and was arrested in the town of Nogales about a mile distant from encampments where were stationed officers and men engaged in protecting the border against threatened invasion from the Mexican side.

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"In my judgment the above facts, coupled with the further fact that Witeke at the time of his arrest was found 'lurking or acting as a spy', conferred jurisdiction upon a court-martial to try him under Article 82 of the Articles of War. Of course, I do not undertake to determine whether the record evidence warranted his conviction."

As a matter of fact, this man was tried by a general court-martial, found guilty, and sentenced to death. Later, by President Harding, he was pardoned.

So far as references to Articles of Land Warfare are concerned, they are based on these records. But as to clandestine evidence, one such admission did come in. As to the zone of operations, he contends that it is not a zone of military operations because there was not a soldier right there. We all know that it is impossible to protect our Atlantic Coast with guards for every mile of the way. Whatever may be the particular defensive means that are used to obtain information as to invaders is a matter dependent upon the particular local situation and the local commanding officer. In this case it was under the Coast Guard. The Coast Guard was patrolling that post in the way it saw fit.

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With regard to the intent to communicate, I would like to read you the statement of the defendant Kerling--I have not got the exhibit number here--

"I was also given four or five matches that were capable of producing secret writing. No one else in my group got any of these matches. I was told that after we became settled and located in the United States I was to communicate by use of these matches with Lieutenant Kappe in Berlin. The communication was to be effected by using a mail drop address in Lisbon, Portugal, which was furnished to me in secret writing on a white handkerchief. This address, which I do not know from my own memory, was to be produced by putting the handkerchief in ammonia and holding it up to the light. There was also an address of a relative of George Dasch's on this handkerchief in secret writing, which I could use to get in touch with Dasch in case I needed assistance from him or any member of his group. This man, a relative of Dasch, would have no other information but Dasch's address.

"It is my understanding that he was given a similar handkerchief containing the mail drop address and the address of my wife, as above, both written in secret writing, to enable him to communicate with Germany or get in touch with me in case he needed assistance. I was told to mention Kappe's name in the secret text hand writing on the letter sent to this Lisbon address and to put a message for Kappe in secret writing using the matches furnished."

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With reference to the statement of the defendant Dasch--
I have not the exhibit number of this, either--

Colonel Royall. What page is that statement on?

The Judge Advocate General. Page 79:

"In regards to communication, I have an undercover address in Lisbon. At this time I do not know the correct address but it is marked on that little handkerchief. I was instructed in Berlin to use this address for the purpose of communicating to them all the additional changes which I happened to observe while I am here and these changes are necessary for the camouflage papers the groups which are here are supposed to follow. Furthermore, whether the landing was succesful and the landing spot satisfactory. Furthermore, I should use this to notify them in case we run short of ammunition, I might call it, or explosives and other material supplies and in case we need any more money that should also be told this way. Also it was suggested to forward in this way correspondence to disclose to them in case anyone of the members should have fallen down on his oath so that they can take the necessary step or steps. Furthermore, the exact location of additional new built industrial centers in the United States which are manufacturing war materials."

I do not think I need read any further on that, if it please the Commission. It shows the intent to communicate with the enemy, not only in this country but in Germany.

The President. I think you spoke of two who were

American citizens, whereas Colonel Royall only spoke of one that was an American citizen.

Colonel Royall. May it please the Commission, the reason that difference occurs is that my motion was not directed to the case of the defendant Burger. We announced that we would take that up separately, and he is the other American citizen.

May I reply very briefly? I would like to say this in reply to the Judge Advocate General. I referred at the outset of our argument to certain motions for a verdict of not guilty which we were not seriously arguing, because the Commission had ruled on it. We referred to charges 1 and 4.

With regard to charge 2, which is the 81st Article of War, our contention is that it applies only to citizens of the United States, which in this instance would apply only to Haupt.

Under Article 82 it is our contention that there is no evidence of operating within the military zone of operations and no evidence of an intent to report military information, and, as Colonel Dowell has said, it requires something more than a bare intent, in any event. You have to have an affirmative act toward doing it, and there is no evidence of an affirmative act to obtain information in this case--not a word. It does not even come to the dignity of an attempt to spy.

Colonel Dowell. May it please the Commission, at this time I would like to add very specifically the portions of the Manual mentioned by me before, by citing exactly, under the 82nd Article of War, the element of proof, which appears at the close of paragraph 142 on page 157 of the Court Martial Manual. This relates to the charge under the 82nd Article

of War. Under elements of proof, the second one requires that, before the offense has been committed, he was obtaining or endeavoring to obtain information with intent to communicate the same to the enemy.

The other one is specifically on page 190 of the Court Martial Manual, under the subject of, "Attempts. Discussion," the third sub-paragraph, in which the language is as follows:

"Soliciting another to commit a crime is not an attempt; nor is mere preparation to do a criminal act."

We are trying to assert here or submit the proposition that there has been no evidence submitted under Article 82 in support thereof, the crime of spying, except preparation.

There was preparation, we frankly admit, that might have resulted in spying, but there was nothing more than preparation. There was no act in that at all, and I think it will be admitted by the prosecution that in the schooling that all these people had received in sabotage there was no schooling in the matter of spying. There was preparation which would have made it possible, but no overt act beyond that, as required.

The Judge Advocate General. May it please the Commission, I think it would clarify the situation if I said this, in view of the argument of defense counsel, so far as the proof of the charges under the 82nd Article of War are concerned, where he refers to the last paragraph of Section 142, and states that two essentials are required:

"(a) That the accused was found at a certain place within our zone of operations, acting clandestinely, or under false pretenses; and (B)" and this is what they

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emphasize--"that he was obtaining, or endeavoring to obtain, information with intent to communicate the same to the enemy."

That is the end of the discussion of the 82nd Article of War, which is headed, "Being a Spy."

I would like to read the third sub-paragraph of that article:

"It is necessary to prove an intent to communicate information to the hostile party. This intent will very readily be inferred on proof of a deceptive insinuation of the accused among our forces," which is here, "but this inference may be overcome by very clear evidence that the person had come within the lines for a comparatively innocent purpose, as to visit his family or that he has assumed a disguise in order to reach his own lines.

"It is not essential that the accused obtain the information sought or that he communicate it. The offense is complete with the lurking or dissimulation with intent to accomplish these objects."

That we claim is fully proven in the evidence submitted by the prosecution.

The President. Is there a desire on the part of any member of the Commission for clarification on the part of either side?

The Commission will close.

(The Commission was then closed. When it reopened the following occurred:)

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The President. The Commission is open.

The first motion of counsel respecting Charge 2, violation of the 81st Article of War, is not sustained.

Referring to the second motion, regarding Charge 3, violation of the 82nd Article of War, the motion is not sustained.

Colonel Ristine. If the Commission please, on behalf of Mr. Dasch, I would like to request the Commission at this time to find a verdict in his favor, of Not Guilty, with respect to all of the charges and specifications, and I would like to make a brief argument respecting that matter.

ARGUMENT ON MOTION OF DEFENDANT DASCH

FOR VERDICT OF NOT GUILTY

Colonel Ristine. At the outset, if the Commission please, I think I would like to propound a question in order that the Commission might have that interrogation in mind as I proceed with my argument.

My query is this: Is it possible for a German subject, who is within Germany, to become so dissatisfied with the ruling power of Germany that he desires, by whatever method presents itself, to leave Germany in order that he may do everything within his power to fight the ruling power of Germany?

I say, is it possible under those circumstances for that German subject to come to the United States with a group, such as entered the United States on the Long Island coast, and by any process of conduct thereafter, convince a commission or a court in this country that he did not have the intention, when he left Germany, to carry out the project intended to be carried out by the group with which he came

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to the United States? I propound the question, Is it possible for any German subject to do that?

In connection with that question I want to briefly relate the facts that have been disclosed to this Commission with respect to the conduct of Dasch.

The prosecution offered parts of a long, voluminous interrogation, and then when we got the entirety of the parts, here is the picture that we have:

Dasch had what might be termed, with a warring nation, a "soft job." His task was the task of listening to radio broadcasts from the United States, broadcast in English, propaganda broadcasts, and then translating those broadcasts, in so far as they had to do with military or allied subjects, into German. He said in connection with the work that he listened at other times to many other broadcasts, but he became very dissatisfied with Hitler and Hitlerism and Nazism and very dissatisfied with the way they were treating all of the countries and the subjects thereof that had been conquered, and he wanted to get away from there in order to fight all of that, because it was contrary to all of his concepts of that which was right and proper. He said that the only thing that offered itself to him was the opportunity to come back to the United States with a group of saboteurs, and he says he never had any intention, from the time he went to the school, of carrying it out.

It is true that it is very difficult to find much of any corroboration within Germany. But let us consider what the situation was. In Germany if you wanted to be summarily executed, about all you had to do was to communicate to some-

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one else in Germany that you were opposed to Nazism and that you were opposed to what was going on, and if that reached the ruling powers, that sealed your doom.

Under those circumstances how could a man make it known clearly what his intentions were as long as he was in Germany?

But, if the Commission please, it does crop out that Burger, in his statement, corroborates Dasch with respect to that matter. Burger in his statement says that Dasch came to the classes late, did not seem to take an interest in them. When he should stand and give the Nazi salute, he had one hand in his pocket, and that his heart was not in it, and that in explanation he said he just could not enter into the thing enthusiastically when he abhorred the whole of it.

That is just one little straw, but that straw shows the way the wind is blowing. Dasch in his statement relates another instance with respect to Burger. Dasch knew that Burger, because of his sympathy for some of those downtrodden people over there that the Germans had mistreated, had espoused their cause, had taken a position against the mistreatment of these people, and as a result thereof he had spent 17 months in a concentration camp and bore the scars of mistreatment.

They sent him down to this school to give him a chance to rehabilitate himself; and on one occasion he wanted to unbosom his innermost thoughts to Dasch, and he just got as far as saying that those "s.o.b's," or whatever term he used, had treated him terribly in the concentration camp, and he wanted to continue, and Dasch said, "Stop. Don't say anything more. There will be a time; a time will come when I will call this subject up again, but promise me one thing now. Do not say

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anything further."

Of course, if the Commission please, if that statement had been overheard and Dasch had not immediately reported it, it probably would have resulted in the summary execution of the two.

Now, let us have that situation in mind when you consider the conduct of these people after they came over to this country.

They effectuated a landing. The boat captain, before they effectuated a landing, had given them explicit instructions that if they ran into a patrol or any other force in effectuating the landing they were to overpower whatever that force was and send them back to the submarine.

What did they run into? They ran into one Coast Guardsman, young and inexperienced, unarmed, by himself, on a foggy night when you could hardly see 25 feet away. And what does Dasch do? There is no controversy about what Dasch did. Dasch approached that man in rapid steps. He instructed the two men who were on the beach yet, from the submarine, to return to the submarine. He engaged in conversation with this boy. Burger came up during the conversation and addressed some remark to Dasch. There were two within a few feet of the Coast Guardsman, who was unarmed. Two more were within a very few feet more, because you could see them in the fog. I think it was described that you could only see about 25 feet. Still Dasch elects to do what? To carry out the purpose, gentlemen of this Commission, for which he came over here? To do no violence, not to harm this boy?

When the boy suggested that he accompany him to his headquarters, with this material on the beach, if Dasch had gone

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he would not have had any opportunity then to assume the role of a voluntary aide and assistant to this government, because he was apprehended landing with all of these explosives. So that, in order to protect himself in the purpose for which he came over, it was necessary for him to do something else, and he thought upon the subject of giving the Coast Guardsman some money to forget the incident. He even thought he had accomplished that. His statements to the F.B.I. agents illustrate that he thought he had accomplished that purpose, so far as the Guardsman was concerned; and the F.B.I. did not dis- abuse his mind of that thought. But you will find in that statement that his conscience hurt him, because it had become necessary, as he thought, for him to corrupt that young, innocent boy by offering him money and his having accepted it in order to forget this incident which was clearly within his duty to report.

Now, what happens? They go on to the station, and we have it in evidence here that Dasch was not particular about concealing the fact that they had made a landing, or particular in concealing everything that was buried there. Burger, on the contrary, purposely left things on the beach and did not bury the things which he had been entrusted to bury so that they could not see part of them sticking out.

Burger disclosed his hand to that extent, because Burger was satisfied, and says so in the statement which he gave, because of incidents that had occurred in the school, that Dasch was not a Nazi enthusiast, such as he was appearing to be in the school; and Burger, who had suffered 17 long months in a concentration camp and who still bears the scars of the

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mistreatment, was not the Nazi that he was purporting to be, but he was desirous of getting out in order that he might be more effective.

They go to a station early in the morning, and Dasch relates in his statement that he then debated whether he would go to the restaurant that was lighted up across the street, and put in a long distance call to the F.B.I. and immediately report the matter; but the close proximity of the other three, Burger and the other two--and Dasch at that time was not positive about Burger, although he thought Burger felt the same way he did--the close proximity of the other three dissuaded him against attempting to put in a long distance call there, because if they learned about it, then of course the effectiveness of it would be immediately negated.

So they go on into New York. They got into New York, and what did they do? They went to a prominent hotel in New York, Dasch and Burger; and, by the way: I might recall to the Commission's attention the statements that both Burger and Dasch made about the argument Dasch had with Kappe in order to get Burger to be his associate in this country. Kappe wanted Burger to go with one of the other two. Dasch, because he knew of the concentration camp experiences and because he knew that Burger's efforts to unbosom himself about those misstatements, wanted Burger with him; and, as Burger relates it, Dasch won out in the debate with Kappe.

They get to New York City, and it is Sunday. But Dasch called the F.B.I. in New York. It is related in detail what he told them. He gave the name of Pastorius, and he told them in that call that he had landed in the United States, had

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valuable information which he wished to give; that he was coming to Washington. He thought it was so big that it should be reported direct to headquarters in Washington, and he asked the F.B.I. man to notify the Washington office that on Thursday or Friday following he would come to Washington and divulge it to the authorities here.

It also appears that he had ordered some clothing, and alterations of the clothing, and he could not get the clothing until Thursday, and therefore he was coming down Thursday or Friday.

He came down, and what did he do? He brought \$82,500 with him in a brief case.

Mark you, he had advised some of the others to put away in some safe place part of the money which they had in order that if they were apprehended and put into camp or prison their loved ones would have something, or they would have something when they came out; knowing full well when he gave them that advice that it would not be long until they would be apprehended, because of the course which he intended to pursue.

Somebody might say that Dasch was a chiseler. Did Dasch put away any of the money which he had? Not one thin dime. He brought it all with him down here; and the fact that he went to one of the public hotels in New York and to the Mayflower Hotel down here, the reservation for which was made before he left New York, certainly discloses that he was moving openly and above-board in every movement that he made, that he was not lurking around any places where he could not be found or located.

When he arrived here he arrived late one evening. The

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next morning he called the Bureau of Information and wanted to know to whom it would be proper to divulge some matters of military information which he desired to divulge. He was given two numbers. One was that of Colonel Kramer, who was, I think, in the Military Intelligence, and the F.B.I. number. And somebody in Washington, as developed here, had suggested the Attorney General, Mr. Biddle, as the proper one to whom to divulge this information.

He called Colonel Kramer first. Colonel Kramer was not in, and he left word for Colonel Kramer to call him back at the Mayflower Hotel. He then called the F.B.I. and got Mr. Traynor on the 'phone, and Mr. Traynor suggested 11 o'clock. Dasch suggested an earlier hour, if possible, and it was moved up to 10:30.

Mr. Traynor agrees, in order that there may be no trouble in Dasch finding the place, to send somebody over to accompany Dasch to the F.B.I headquarters. That was done.

Mr. Traynor has related that in a period of five or six days of conference and interrogation they had checked part of the statements, and everything they had checked was accurate and correct. He said they had not checked all of them, but in so far as they had checked in that long document it was all true. He says he told Dasch that he believed him, believed he was honest and sincere. Now he says that something occurred afterwards to cause him to waver; and that something, if the Commission please, as related by him, had to do with the agreement by which Dasch was to enter a plea in the court in New York and take punishment with the rest and then procure a Presidential pardon within six months.

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The first witness was sure that the promise of the Presidential pardon was specific and definite. The second witness stated that it was merely an effort to recommend and procure such a pardon with six months mentioned as the probable duration of the incarceration; so that I take it, if the Commission please, it does not matter which version we accept; we can agree on the proposition that it was agreed all around that a six months incarceration should suffice, and that was mainly for the purpose of protecting his father and mother in Germany.

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On Sunday morning following the agreement, with the headlines in the papers, Dasch withdrew his consent to enter the plea. It was not surprising, if he was going to enter the plea to keep the information from getting back to Germany, so as to protect his father and mother, and the information is broadcast on the front page of the papers. It would serve no useful purpose, under those circumstances, to protect his father and mother, to enter a plea. He said he would not enter the plea.

As I recall it, that was the incident which caused Mr. Traynor to have some doubt about the sincerity of Dasch. But I think we will all have to agree that there is nothing in this record to show that the prosecution has met the burden which is imposed upon it to prove beyond a reasonable doubt that Dasch is guilty of having come over here for the purpose of committing any act of sabotage or any act of law violation.

Let us view a few other exhibits. Dasch left a letter for Burger in the hotel room, or with the clerk, to be delivered to Burger when Dasch left for Washington. When Burger was arrested, the F. B. I. seized it and offered it in evidence, presumably to show an association between Dasch and Burger. But there is nothing in the letter inconsistent with Dasch's statement that he came over here for the purpose of fighting Hitler and for the purpose of getting to a point where he could effectively fight Hitler, and that it was equally necessary in fighting Hitler to thwart the efforts of these two groups and any subsequent groups which might come to this country.

Let us consider the second letter. After the phone

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calls had been perfected in Washington, Dasch wrote a second letter to Burger, in which he advised him that he had contacted the proper parties and that he would report further to Burger, admonishing Burger to keep track of the other two and to remain in the room as much as possible and not to run around and not to talk, saying that Burger would hear from Dasch or the F. B. I.

While Burger was in protective custody, the F. B. I. intercepted that letter. I have no criticism of the F. B. I. for intercepting that letter. I think it was the proper thing to do. They intercepted the letter because they thought it would contain the innermost thoughts and secrets of Dasch, and if those thoughts conflicted in any way with the statements he was currently making, they would know about it. But the letter corroborates Dasch in every particular.

The second letter was written by Dasch to Burger after several days of conference, but that letter was never mailed. It was delivered to a member of the F. B. I. and was never mailed but was placed in the F. B. I. file. However, that letter, if the Commission please, is also consistent with and corroborates Dasch's contention that he never had any thought in his mind of committing any act of sabotage but solely came over here for the purpose of getting away from Germany, where he could not act, in order that he might act effectively over here.

The question arises, what will the Commission do under those circumstances? I agree with the argument of counsel on the other side that if there^{is} substantial evidence here to show the guilt of Dasch, he should not be acquitted. But I

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say to this Commission that if you view this testimony in the most favorable light for the prosecution, you will inevitably say that there is a very serious doubt in your minds as to Dasch's guilt, if you do not go even still farther and say that you are convinced of his innocence. The burden is upon the prosecution to prove his guilt beyond a reasonable doubt. The burden is not upon him to prove his innocence. I believe he has met that burden in this case. I believe he has met the burden of proving his innocence. But it is not necessary for an acquittal that we meet such a burden. All that is necessary is that there be a reasonable doubt in the minds of the Commission as to his guilt; and if there is, he is entitled to it and to an acquittal.

We feel at this time, at the close of the prosecution's case, that Dasch is entitled to an acquittal with respect to every count.

The Judge Advocate General. May it please the Commission--

The President. The Judge Advocate General.

REPLY TO MOTION OF DASCH FOR VERDICT OF NOT GUILTY

The Judge Advocate General. Counsel for the accused Dasch has made a very excellent argument if it were made at the conclusion of the evidence and not at the conclusion of the prosecution's case. It is not a question of the prosecution's proving this accused's guilt beyond a reasonable doubt for the purpose of a motion for a finding of "not guilty" at the end of the prosecution's case; it is simply for the Commission to decide, as I said before in replying to the other arguments, whether or not the evidence submitted by the prosecution, taken in its most favorable aspect,

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raises any presumption of guilt; or, as stated here, must be accepted by the Commission in determining whether the prosecution has established its case.

You have here, so far as this argument is concerned, the confession of the accused Dasch. With reference to that confession, I just want to read one paragraph from Wharton's Criminal Evidence, Section 606, Pages 1012 to 1015:

" * * * It is also well settled that if a confession is made under such circumstances as to authorize its admission in evidence the accused is entitled to have the entire conversation, including any exculpatory or self-serving declarations connected therewith, also admitted. However, it is for the jury"---

in this case the Commission---

"to say what weight shall be given to the several parts of the statement, as they may believe that part which charges the prisoner and reject that which tends to exculpate him."

It will be the duty of this Commission upon the completion of all the evidence in this case to consider this confession and to take whatever part of it you wish--all of it if you think it is credible, or you may reject any exculpatory statements made in such confession.

But that is not the duty of this Commission at the present time under this Article. The question is simply, From the confession and the evidence produced, taken in its most favorable light, has the prosecution made out a case and submitted sufficient evidence to connect this accused

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with the case? I submit that upon the facts it is not necessary to argue the various details that have been brought up by counsel in their arguments. The question is simply, as I have said, Has the prosecution produced sufficient evidence which, taken in its most favorable light, would establish a prima facie case? That is all that is involved in this present argument.

The President. Mr. Attorney General?

The Attorney General. I do not want to add anything unless the Commission should desire to be enlightened on any point.

The President. Is there any point on which the Commission wishes enlightenment? There seems to be none.

Colonel Ristine. If the Commission please--

The President. Colonel Ristine.

Colonel Ristine. If the Commission please, just in answer to the argument of the prosecution, it is my contention that the evidence to date, taken in the most favorable light for the prosecution, does not make out a case against Dasch; in fact, the prosecution's evidence with respect to the last F. B. I. agent who was on the stand only created a doubt in his mind about the truthfulness of Dasch's statement. Furthermore, the F. B. I. agents who proposed a plea of guilty with six months' incarceration certainly were unanimously agreed that Dasch was not guilty, or else they could not have made such a proposal, if the Commission please.

I say that taking it in its most favorable light against Dasch--taking everything in the most favorable light against

him--the prosecution has not made out a case at all.

Colonel Royall. May it please the Commission: As announced at the outset, we desire to make a motion on behalf of the defendant Burger. I want to go into that case in detail. Colonel Dowell and I feel that at this stage of the proceedings, adverting to the rule read by the learned Judge Advocate General, we do not object to that test being applied to the evidence adduced in our case. We are confident that an application of those principles to the Burger case should result in a dismissal of all charges against him.

It is quite a thankless task to address this Commission on so many subjects, as to none of which we seem to be very successful. I am not saying that in any way critical of the Commission, because my confidence is unshaken that the Commission has given to every question careful and painstaking thought. The mere fact that my opinion and Colonel Dowell's opinion may differ from that of the Commission does not, of course, shake our confidence in the Commission's integrity and willingness to hear this matter discussed.

I should like very much to defer the presentation of the Burger argument until tomorrow morning. I do not want it split in two. It is impractical to finish it this afternoon, since it is almost the closing hour. We have gone through the evidence of every witness so far as it relates to Burger. We have analyzed it. We want to present it in full to this Commission.

There are a number of reasons why we should like to do so. It will take probably as long as, perhaps longer than,

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Colonel Ristine's presentation, which took 45 minutes, to present our view to you, and I would rather not start on it this afternoon.

The President. We have the case before us now on the motion with regard to Dasch only. Have you anything further to add, General, not with respect to Burger but with respect to the Dasch motion?

The Judge Advocate General. Not at this time.

Colonel Royall. I have this in mind. I did not make this point clear. There are a number of similarities between the Dasch case and the Burger case. There are some dissimilarities. I did not know whether or not the Commission would want to defer decision on this point.

The President. Mr. Attorney General?

The Attorney General. I should think it was appropriate, unless there was some other reason for it, to have the motion of Colonel Ristine in behalf of Dasch decided now. There may or may not be similarities, but the Dasch situation has been put before you at great length, very ably, and in great detail. I should think it would be appropriate to have that decision made first. I think the Burger case is different. In my opinion, the Commission should take up its decision upon each case while it is still hot. However, it is discretionary with the Commission whether or not you will do that, and it is a matter which I should not want to argue at great length.

The President. The Commission will close.

(At this time the Commission was closed. When it reopened, the following occurred:)

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The President. The Commission is open.

The Commission will not make a ruling at this time on the motion of counsel for the defendant Dasch but will adjourn until ten o'clock tomorrow morning, when it will hear the defense counsel Colonel Royall in the particular case of the defendant Burger.

We will adjourn until ten o'clock tomorrow morning.

(At 4:30 o'clock p. m. an adjournment was taken until Tuesday July 21, 1942, at 10 o'clock a. m.)

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